LEGISLATIVE REVIEW PROJECT

SUPPLEMENTARY REPORTS TO THE DIRECTIONS REPORT

PART IV - SPECIFIC INDUSTRIES

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LEGISLATIVE REVIEW PROJECT

SUPPLEMENTARY REPORTS

The following are Supplementary Reports to the Directions Report, which has been submitted to the Ministry of Consumer and Commercial Relations by the Legislative Review Project.

These Supplementary Reports provide the details of the research, consultation and analysis that led to the Directions Report. They also include an extensive summary of the Review Projects proposals: proposals aimed at ensuring a fair marketplace that will benefit Ontario consumers and businesses alike.

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PART IV - SPECIFIC INDUSTRIES

32. Real Estate and Business Brokers Act

THE REAL ESTATE AND BUSINESS BROKERS ACT

BACKGROUND

The Real Estate and Business Brokers Act was passed under a different name in the early 1930's to provide for the licensing of real estate brokers. It has been subject to amendment in the 1950's and 1960's to expand the scope and nature of the regulation of the real estate industry.

INFORMATION-GATHERING PROCESS

The information-gathering process conducted during the review of the Real Estate and Business Brokers Act involved an extensive literature review, consultations and an expert panel discussion.

1) Literature Review

The information-gathering process began with a literature search and review of relevant academic materials and texts. In addition, relevant legal texts and court decisions were examined. Newspaper articles from Ministry clipping files were also reviewed for information and perspectives on the issues.

a) Other jurisdictions

The real estate legislation of the other provinces was obtained and given a comparative review to determine trends, as well as to identify unique approaches to particular issues. A sampling of American real estate legislation was also given a comparative review.

b) Interest groups

The Ontario Real Estate Association (OREA), which represents approximately 80% of the brokers and salespeople in the province through 48 local boards, has made a number of submissions to the Ministry in the past. Prominent among these is the proposed Real Estate Agency Act, which was prepared with the cooperation of Legislative Counsel in 1983. This proposed Act, although never tabled in the House, was used as a reference source in the project's review. This was based on the fact that OREA has stated that it has not significantly altered its position on many of the issues addressed in that draft legislation.

Other formal written OREA submissions reviewed included "The Recommendations of the Licensing Task Force of the Ontario Real Estate Association" (March 20th, 1986), "Recommendations for Concepts to be included in the Real Estate and Business Brokers Act" (June, 1986), and "Ontario Real Estate Association 1986 Membership Survey"

(October, 1986).

In addition to the review of the formal submissions from OREA, an examination of their bylaws and a representative sampling of local board bylaws was made. Further, OREA educational and other course-related materials were studied. A number of other informal educational materials were also obtained from other sources and included in this general review.

In addition to OREA submissions, a brief was submitted to the Ministry of Consumer and Commercial Relations by the Ontario Home Builders Association, dated August 28, 1987.

2) Consultations

To obtain a clearer understanding of the real estate market and the issues identified as requiring a detailed examination, a number of consultations were planned and implemented. These consultations involved meetings with staff of the Ministry of Consumers and Commercial Relations, industry associations and individual registrants.

a) Ministry consultations

In order to obtain a regulatory perspective of the issues, the review team conducted a series of ongoing consultations with the Registrar of Real Estate and Business Brokers, Alan Coleclough, the Director of the Business Regulation Branch, Eric Tappenden, and Randy Reese, a representative of the Consumer Services Branch.

b) Public consultations

Due to the fact that there is no organized voice for consumers with regard to real estate transactions, a legal consultant was contracted to assist the review team in identifying concerns from the perspective of individual purchasers and vendors. The consultant selected was Robert Gray, a lawyer with the firm of Agozzino Baker Gray, who specializes in all facets of real estate.

Although OREA is recognized as being representative of the real estate industry in Ontario, it was decided that additional perspectives could be gained from meeting with registrants to discuss issues from their point of view. To this end, an extensive consultation process was developed, resulting in over 20 meetings between project staff and brokers, local boards and sales representatives. Participants in this consultation process were selected with a view to representing the diversities within the industry, including size of operation, type of operation, area of real estate specialization and area of geographic location in the province. The Registrar helped the review team in the selection of participants for this consultation process. A detailed list of the participants

follows:

Industry Consultations

Donald and Sandra Bain
Bain and Bain Real Estate
North Bay

Walter Hayes
Ontario Director, National Real Estate Services
Don Mills

Glenn Haskett
Glenn M. Haskett Inc. Realtor
Toronto

Sadie Moranis
Sadie Moranis Limited, Realtor
Don Mills

Steve Wong
Steve Wong Real Estate
Toronto

Bruce Nicholson
President, Kitchener-Waterloo Real Estate Board
Mahlon Roes Real Estate Ltd., Realtor
Waterloo

Mike McMurray
Vice-President, Ontario Real Estate Services
The Canada Trust Company
Toronto

Evan White
President
Coldwell Banker Canada Inc.
Toronto

Lawrence O'Brien
Major Realty of Windsor
Windsor

Mike Campbell, staff; Harry Riohaupt, President; Jim Holody, Vice-President; Joe Pinheiro, Past President; Ian McPherson, President, Marketing Division; (Salespeople)
London and St. Thomas Real Estate Board

Terry Hemming
Century 21 McClennan & Hilts Ltd.
Woodstock

Frank Reardon
Rhodes Realtor Real Estate Services Ltd.
Ottawa

Ozwald F. Jurock
President, Residential Real Estate Services
Royal LePage Real Estate Services Ltd.
Don Mills

John Harvey
John W. Harvey Real Estate Co. Ltd.
Hamilton

James Poapst
Senior Vice-President
Nesbitt Thomson Realty Limited
Toronto

Tom Shea
Chairman, Family Trust Corporation
Markham

Irene Holowka, executive director; Ed Kalyta;
Bob Pfaff; Ron Clark
Thunder Bay Real Estate Board
Thunder Bay

Brian O'Brien
O'Brien Agency Limited
Thunder Bay

Walter Frank
W. Frank Real Estate Limited
Oshawa

J. Chris Davis
President, Commercial Real Estate Services
Royal Lepage Real Estate Services Limited Realtor
Toronto

Kingston and Area Real Estate Association
(presented a written submission)

Steve Moranis; Julian Merry; David Rossi;
Nate Green, Past President
Toronto Real Estate Board
Don Mills

Malcolm Knight
Canadian Real Estate Services
Toronto

In addition to the consultation meetings previously outlined, the review team held a series of ongoing consultations with staff members of both OREA and the Toronto Real Estate Board, which represents a substantial proportion of OREA's membership. Meetings were also conducted with the Real Estate and Business Brokers Act Committee of the Ontario Home Builders Association.

3) Expert panel discussion

To obtain further input on the nature of the issues an informal round table discussion was planned.

The two-day expert panel discussion was held in Toronto on August 5th and 6th 1987, with representatives from the Legislative Review Project, the Ministry of Consumer and Commercial Relations, and industry and consumer advocates. A detailed list of the participants is as follows:

Participants in the Expert Panel

Zelma Reeve, Consumers' Association of Canada

Tom Bosley, Realtor

Enio Tersigni, Realtor

Frank Reardon, President
Ontario Real Estate Association

Bruce Nicholson, President, Kitchener-Waterloo
Real Estate Board

David Horton, Ontario Home Builders' Association

David Brown, Executive Secretary
Toronto Real Estate Board

Members of the Legislative Review Project
Housing Team: Sudhir Handa, David Scriven,
Janet Hope-Roney, Judy Farlow
and Roger Beattie

Alan Coleclough, registrar

Terry Hemming, assistant registrar

Robert Gray, lawyer and consultant to the project

GENERAL PROBLEM AREAS

The predecessor of the Real Estate and Business Brokers Act was passed in 1930 in response to an industry request for registration. This original statute simply provided for issuance of a licence upon payment of a registration fee. It did not include many traditional consumer protection mechanisms, such as educational qualifications. It was not until the 1950's and 1960's that certain basic consumer protection-oriented provisions were included. The statute has not been significantly amended since that time.

Although the legislation has not been altered much over the

last decade and a half, the industry has seen many dramatic changes during that time. In addition to a major increase in the number of registrants, many brokerages have developed highly specialized and technical practices. Other brokers have broadened their activities to the extent that many now provide a full spectrum of real estate services. Included in this array are formal or informal links with financing corporations, home inspection, appraisals, relocation and other related services. Finally, the very nature of a brokerage has evolved to include large corporate brokerages with branch offices across the province and franchise operations with high visibility through provincial promotions.

Two fairly recent "hot markets" have served to fuel the growing concerns of consumers over the activities of real estate agents. Many consumers view agents as having earned substantial profits through speculative practices during this period at the expense of prospective vendors and purchasers. These perceptions have highlighted the fact that the current legislation does not adequately provide the "teeth" necessary to adequately protect the public.

Until the legislation is strengthened, the problems within the real estate industry will grow. In an inherently competitive business, even brokers with reputations for the highest level of integrity are hard pressed to comply with provisions which are regularly ignored by a growing number of registrants.

In addition to requests from both the public and the industry for more effective legislation, the widening gap between the current marketplace and the statute must be addressed. This need cannot be satisfied through a fine-tuning of the current statute. Rather, a systematic rethinking of the legislation as a whole must be implemented with a view to reflecting the changing real estate services environment.

SPECIFIC ISSUES

Ten major issues were identified, as follows:

1) Philosophy

In order to make decisions with regard to the following issues, it was determined to be necessary to precisely define the purpose of the legislation intended to regulate the real estate industry.

2) Scope of the Act

Many new services have been developed that fall within the definition of "trade", although they may not be actively regulated, or are not directly related to the real estate sector. These new services need to be examined to determine whether they should be covered by the legislation. In addition, current exemptions from the registration require-

ments under the legislation need to be reviewed in light of current practices.

3) Who Should Regulate the Real Estate Industry?

The industry has been lobbying for self-regulation for a number of years, culminating with the development of draft legislation which was never formally introduced in the Legislature. Within the existing regulatory framework, the real estate industry has been delegated the ability to deliver the educational programmes. In light of a comprehensive review of the legislation, it is necessary to re-assess where the administrative and regulatory responsibilities should most effectively be placed.

4) Agency and Conflicts of Interest Associated with Agency

The nature of the agency relationship between a prospective purchaser or vendor and an agent has been addressed. At issue is the clarification and expression of the nature and extent of an agent's role and responsibilities. A specific concern addressed involves the current misconception that agents in a cooperative sale are representing purchasers.

The purchase and sale of real estate by registrants, including transactions between agents and their principals, has also been considered. Current disclosure requirements are reviewed and alternatives explored.

5) The Employment Relationship Between Brokers and Salespeople

The Act is designed to ensure a high degree of accountability by placing brokers in a supervisory role over their salespeople. Supporting this objective is the requirement of an employment relationship between these two parties. Recently, however, this relationship has been challenged both in practice and in the courts. There is, consequently, a need to re-assess both the objective and the implementation of this provision.

6) Forms of Brokerage

The Ministry can only effectively regulate people or corporations that are required to be registered under the Act. The development of franchise brokerages has challenged the ability of the statute to effectively regulate the industry, due to the fact that the legislation does not require a franchisor to be registered. In addition, share structure provisions designed to ensure that brokers are in control of a corporate brokerage have been demonstrated to be ineffective and need to be reviewed.

7) Licensing and Education

The current licensing categories and related criteria are out

of step with both current practices and public expectations. Further, the existing educational requirements and their delivery, in addition to not being sufficiently recognized in the legislation, need to be updated. This is especially true in relation to suggested changes in the licensing categories.

8) Discipline and Enforcement

Presently, the responsibility for discipline and enforcement of the legislation rests with the Registrar. In practice, however, many discipline activities are performed by the local boards. The increasing disparity between available Ministry resources and the number of registrants means that the enforcement activities of the Ministry are extremely taxed. Further, existing sanctions need to be reviewed in light of calls from both the public and the industry to increase enforcement and discipline measures.

9) Consumer Remedies

Currently, consumers who been wronged by a registrant have three avenues of redress: the Ministry, the industry and the courts. None of these routes appears to be effectively responding to this growing need. Further, current bonding requirements for registrants are seriously out of date and need to be reviewed. Such a review must include an examination of alternate public protection measures, such as a compensation fund.

10) Trust Money and Accounts

As the value of property continues to increase, required deposit funds also rise. Current practices within the industry relating to these trust funds are almost uniformly in violation of the requirements of the Act. Therefore, it is necessary to review both, to ensure that prospective purchasers are fully protected, while at the same time the trust obligations of registrants are in step with current trade practices.

PROPOSED DIRECTION

1) Philosophy of the Act

As stated before, the original aim of the legislation was to facilitate the registration and licensing of real estate brokers. It did not include consumer or public protection measures. The real estate industry has undergone a number of dramatic changes in the last two decades, which have pointed to the need for some sort of protection component. Although the legislation has been amended to provide some protection, this has been done on an ad hoc basis.

It is clear that the current legislation must be comprehensively reviewed and new legislation drafted to reflect the current real estate marketplace, as well as anticipated future developments. In order to provide a consistent framework for the review of such a statute, it is vital that the philosophy for regulation be identified and expressed.

The general purpose of most of the legislation within the mandate of the Ministry of Consumer and Commercial Relations is to ensure that business-to-consumer transactions take place on an even playing field. A real estate trade, however, does not fall within the traditional perception of a business-to-consumer transaction. Instead, transactions may be between consumer and consumer, business and business, or consumer and business, with no clear divisions between these different forms of trade. Further, the focus of the legislation does not address the parties to the trade, that is, the vendor and purchaser, but rather the agent for those parties.

Proposed Direction

The Legislative Review Project proposes that the philosophy for the regulation of real estate be the provision of public protection. Such an approach, as compared with consumer protection, is justified by the particular nature of the real estate marketplace. In light of the general Ministry goal of a fair marketplace and the variety of trades and participants in a real estate transaction, it is necessary to provide a basic level of regulation for the entire real estate industry.

2) Scope of the Act

The real estate marketplace has significantly evolved since the first regulatory statute from a relatively straightforward business to one that is considerably more complex. Thus, in revising the Real Estate and Business Brokers Act, it is necessary to consider its scope in order to respond to issues in the current and future real estate marketplace.

The scope of the statute is currently governed by three general provisions: section 1(i) which defines the term "real estate", section 1(n) which defines the term "trade", and section 5 which enumerates the exemptions from registration. The combined result of these three provisions is that the current scope of the legislation is very broad.

In the current marketplace, many new services associated with real estate transactions fall within the scope of the Act but are not, in practice, regulated by the Ministry. Alternatively, many new real estate related services do not fall within the scope of the Act. Each of these new services needs to be reviewed to determine whether they should be included within the scope of revised real estate legislation.

a) Property management

Property management falls within the definition of "trade" as that term includes "leasing", a function that is usually involved in this service. Certain types of property management are currently exempted as a consequence of an exemption for owners and full-time salaried employees of property owners. For those property managers who do fall within the scope of the legislation and are not exempted, the Ministry does not presently enforce the registration requirements.

b) Home inspection

A recently introduced real estate service is home inspections. This service is not specifically within the scope of the statute, unless it is determined to be in "furtherance of a trade" as expressed in the definition of "trade".

Three general problems have been identified with regard to this service. First, there are no prerequisites for individuals presenting themselves as home inspectors. Second, public perceptions of what a home inspector does tend to include more than the service actually provides - that is, there is a perception that home inspectors give a guarantee that a home is in good condition (including hidden defects), which they cannot do. Third, potential conflicts of interest were noted between the provision of home inspection services and a real estate agent's services. The Ontario Association of Home Inspectors has recently been established and has adopted a code of business standards, which include a code of ethics. The Association is anxious to have the opportunity to demonstrate that it can respond to any concerns the public may have with regard to this new service.

c) Appraisal services

Appraisal services include the act of estimating the market value of real estate. They may also involve preparing highest and best use feasibility studies for land development, investment analysis, forecasting cash flow of proposed commercial developments, and real estate consulting. Many of these functions may, in fact, be viewed as being in "furtherance of a trade" as included in the definition of "trade" in the statute. The Ministry does not regulate appraisal services.

The Appraisal Institute of Canada has been established for five years and has set high and uniform standards for its membership. The Institute awards a number of different designations which identify levels of educational achievement and years of practical experience.

d) Home finding services

Home finding services have developed in recent years in

response to increasing difficulties faced by consumers trying to find rental accommodations. The term "real estate," as defined in the statute, includes "leasing" and the definition of "trade" includes an "attempt to list real estate for the purpose of such a disposition or transaction". As a result of this combination of statutory language, such services fall within the scope of the legislation. The Ministry does not, however, enforce registration requirements related to home finding services.

These services have been identified as a source of consumer complaints by the Ministry. Generally, these complaints appear to be based on a misunderstanding of the nature and extent of the services being provided.

e) New home sales

New home sales are not specifically exempted from the Act. Sales people for new homes, however, are generally included in the registration exemption for owners and full-time salaried employees of property owners. Although most sales of new homes fall within this exemption, it should be noted that a growing number of builders are contracting with licensed real estate brokers to sell their product.

In recent years, the purchase and sale of new homes has been identified as a major source of consumer complaints by the Ministry. Most of these complaints centred on the issues of delayed closings, incompletions, substitutions, and the quality of workmanship. The review team has prepared a more detailed discussion of The New Home Warranty Plan Act.

In addition, complainants have raised concerns with regard to the manner in which new homes are represented during the purchase and sale transaction. In relation to this concern, questions have been raised concerning the qualifications of persons acting as new home salespeople for a builder. Currently, there are no assurances that such people have a good understanding of real estate and contract law, as well as the common law and statutory rights of a purchaser.

f) Timesharing

A timeshare unit is one of a series of similar and exclusive rights to use property in succession, with other persons entitled to a similar right. Timesharing is a recent phenomenon, with few precedents in law for determining the respective rights of the parties involved. It has also taken on an international perspective. People in the province may purchase timesharing rights outside the province and, at the same time, people outside the province purchase timesharing rights within Ontario. Although time-sharing interests are not specifically addressed in the legislation, they may be generally determined to be included in the broad definition of "real estate."

Of particular concern is the potential for misrepresentation of what is involved in the purchase of a timesharing interest, and what obligations are assumed upon the purchase of such an interest. The Ontario Law Reform Commission has been studying timesharing for a number of years and has promised a detailed report of its findings in the near future.

g) Cooperatives and Co-ownership

Cooperative ownership is another relatively new form of property ownership, which is perhaps closer to purchasing an interest in a business partnership than real estate. Buying into a cooperative does not involve the purchase of a right to possession of a dwelling unit.

Co-ownership is slightly different from a cooperative, in that the interest purchased is in a corporation rather than a partnership. As a result, a co-owner has a more limited liability. A co-owner does not, however, have any right to the use of a particular dwelling unit.

As a result of potential misunderstandings or misrepresentations of the nature of the interests purchased in regard to cooperatives and co-ownership, the Residential Sales Complex Representation Act was passed in 1983. This little-known or-used statute states that vendors or their agents cannot mislead a purchaser to believe that the purchase of an interest in a residential complex also includes the right to occupy a dwelling unit or exclusive ownership of a dwelling unit.

h) Condominiums

While condominiums are a relatively new form of property ownership, the Ontario Government has addressed most aspects of this form of lifestyle in the Condominium Act. (The review team has prepared a more detailed examination of this legislation). A concern does exist, however, with regard to the level of disclosure on resale, and it has been suggested that this concern may be addressed through the Real Estate and Business Brokers Act.

Proposed Direction

The Legislative Review Project proposes that for clarity, new legislation should specifically exclude the following services from registration requirements:

- multiple listing services;
- home finding services;
- home inspection services;
- appraisers;
- property managers.

o It should be noted that consumer concerns regarding home

inspection and finding services have been identified for further monitoring. In addition, it is proposed that the Consumer Protection Code will generically address many of the areas of public concern with respect to these services.

With regard to new homes sales, the review team proposes that the registration exemption for full-time salaried employees of a property owner be deleted. Builders, including corporate directors, would continue to have the right to sell their new homes without the requirement of registration under the legislation. Should developers, however, desire to hire someone to sell their newly constructed homes, they would have to use real estate registrants.

It is proposed that the definition of a "trade" be expanded to specifically include timesharing interests, and that requirements for disclosure be included in the statute.

The review team proposes that trading in cooperatives and co-ownership interests be specifically brought within the scope of the legislation. In this regard, consideration should be given to incorporating the provisions of the Residential Sales Complex Representations Act into the new legislation.

The Legislative Review Project proposes that a new real estate statute supplement the disclosure requirements of the Condominium Act with regard to resales.

3) Who Should Regulate the Real Estate Industry?

In the early 1970's, self-regulation was raised by the government as an option to be explored. In 1984, a bill to provide for self-regulation was drafted, but never introduced into the Legislature. Divided opinion within the industry, as well as in the Ministry, ultimately prevented the bill from proceeding further.

Nevertheless, self-regulation remains an important goal for the industry. In conjunction with this industry mandate, concerns have been expressed with regard to the ability of the Ministry to effectively regulate such a vast and diverse industry in light of budget and personnel restrictions.

In this regard, it is valuable to note that certain regulatory functions have, at least in part, been delegated to the Ontario Real Estate Association (OREA). Specifically, OREA has been recognized as the provider of the educational program which serves as a prerequisite to the granting of a licence. In addition, OREA has established a credits committee to review applications from prospective registrants seeking an exemption from one or more of the licensing requirements. After its review, the credits committee makes a recommendation to the Registrar, who has the final decision-making power.

Currently, the Registrar of Real Estate and Business Brokers grants licences and has the power to suspend or revoke a licence, subject to a right of appeal to the Commercial Registration Appeal Tribunal (CRAT). In addition to the regulatory powers of the registrar, the Canadian Real Estate Association (CREA) has established a code of ethics, which is implemented through an ethics board established at the local level. Approximately 80% of registrants in Ontario are subject to the CREA code of ethics through this framework.

Proposed Direction

It is proposed that a combination of real government authority with some specific administrative, enforcement, and/or decision-making power be delegated to a representative industry group. This proposal would establish a legislative direction of co-regulation, with the Ministry retaining ultimate authority over all delegated functions.

4) Agency and Conflicts of Interest Associated with Agency

a) The Agency relationship

Agency is the primary activity regulated under the Act. Although the regulation of this activity is considered fundamental, there is a great deal of misunderstanding concerning the duties and obligations which flow from the creation of an agency relationship. Further, the legislation does not directly address the concept of agency. Of specific concern is that many current practices of registrants are out of step with the common law and that neither the legislation nor the industry is addressing this division.

Many parties to a real estate transaction, primarily purchasers, have developed a misconception concerning the nature of the respective roles and obligations of registrants.

Purchasers are often led to believe, whether intentionally or inadvertently, that a broker will guide them through the process of buying a property and will represent their interests in the transaction. These expectations are supported by the fact that the selling broker has often had a number of meetings with prospective purchasers and been provided with very specific information concerning their needs and means. Unless a specific agreement has been made between the purchaser and the broker, however, the only agency relationship established by a registrant will be with the vendor. This relationship is established through a combination of the listing agreement and the multiple listing service agreement to which most brokers in Ontario are a member.

Proposed Direction

The Legislative Review Project proposes a three-pronged approach to the problems of agency and conflicts of interest associated with agency. First, a basic level of disclosure is suggested to ensure that all parties to a transaction, as well as other third parties, have a clear understanding of the allegiances of the agents involved. Second, a statutory provision designed to bring agency relationships into line with current market expectations is proposed. Through such a provision, a selling broker in a multiple listing sale would been deemed by the statute to be representing the purchaser, regardless of the common law rules of agency. Third, to clarify discrepancies between the common law and statutory expectations and responsibili- ties of agents to their principals and third parties, it is proposed that these duties be expressed in the legislation or regulations.

b) The purchase and sale of real estate by agents

Due to the knowledge and expertise of brokers and the reliance placed upon them by purchasers and vendors, the statute requires that agents provide a disclosure statement when they purchase or sell real estate. Section 31 includes two levels of disclosure, with a higher level of disclosure being required when agents are purchasing from their principal. The requirements of the common law with respect to disclosure when purchasing from a principal, however, are substantially higher than those required by the statute. Two matters of concern with regard to these provisions are examined below.

The first issue is whether agents, after complying with disclosure requirements, should be entitled to earn a commission on a transaction in which they purchase from a principal. One Ontario court has noted that this could only occur "under the most extraordinary circumstances"; however, it is not clear whether this test would be satisfied by a full and comprehensive disclosure.

The second issue involves a new form of agreement between a prospective vendor and an agent, known as a guaranteed sales contract. Under the terms of this contract, a broker agrees to purchase a property, usually at a price slightly less than the list price, if it cannot be sold within a specified time period. While such a contract has definite advantages for a vendor who must sell a property, it is important that the contract not serve as a disincentive for the listing broker to obtain the best price for the property.

Proposed Direction

It is proposed that the disclosure requirements for a registrant purchasing real estate be streamlined and clarified. Toward that end, it is proposed that brokers be prohibited from purchasing real estate from, or selling it to,

a principal, except on the basis of a guaranteed sales contract. Through this approach, only one level of disclosure would be required; that is, disclosure to third parties when an agent purchases or sells real estate.

To conform with this proposed direction, the current disclosure requirements will need to be amended to remove the two levels of disclosure and require one form of disclosure which is consistent with the common law. As a result, agents will not be able to profit through a commission when purchasing or selling a property as a principal. If an agency relationship pre-existed, that relationship would need to be terminated by the agent before a purchase or sale of real estate could be finalized.

It is further proposed that guaranteed sales contracts be specifically recognized in the statute and that certain fundamental protections be established to ensure that they are not abused.

5) <u>The Employment Relationship Between Brokers and Salespersons</u>

It is the intent of the current legislation, in regulating the real estate industry in Ontario, that ultimate responsibility for salespeople should rest with a broker. With this approach, salespeople are considered extensions of a broker, who is responsible for their supervision and the consequences of their actions. Specifically, this approach requires that a salesperson be in an employment relationship with a broker to ensure that sufficient control is available to brokers to allow them to perform their supervisory role. Recent practices in the marketplace, and a court decision, have demonstrated that this intention is not necessarily being effected in practice.

The practice of "desk-renting", in which a broker takes a small to nil percentage of a salesperson's commissions but charges a fixed monthly rental fee for the services provided, has gradually become more common in the industry. Within such a practice, the incentives for a broker to supervise are diminished and replaced with an incentive to obtain more salespeople. This type of brokerage can lead to an office in which the number of salespeople is clearly beyond that which could be effectively supervised by a broker.

A recent Ontario Court decision has held that a salesperson could be considered an independent contractor. Although the incentive for this court action was based on a broker's responsibilities under income tax and other related laws, it clearly challenges the supervisory concept of the legislation. The decision is presently under appeal by the Ministry.

Proposed Direction

It is proposed that the concept of an employment relationship between brokers and salespersons be maintained. Toward that direction, there exists a need to clarify the language of the statute that allowed a court to find an alternate interpretation of this relationship.

It is further proposed that the statute allow for the development of regulations which include a maximum number of salespersons for which one broker can be responsible. Many large corporate brokerages already use similar guidelines internally, and it is suggested that a clear correlation between the supervisory ratio can be determined and demonstrated.

6) Forms of Brokerage

Traditionally, real estate businesses have been run by an independent sole proprietor holding a licence as a broker, who hired sales representatives to act on his or her behalf. Responsibility for agency and the running of the business rested securely with the broker. The development of other business structures in the real estate industry has resulted in a far greater diversity in the forms of brokerage.

In response to some of these changes, the statute recognizes corporate brokerages. In addition, the Act controls the share structure of corporate licencees to ensure that responsibility for a corporate brokerage rests with people licensed as brokers. The language of this provision, however, is not in step with current share structure options and, as a result, its intent is easily circumvented. Further, related provisions concerning restrictions on the share holdings of salespeople creates a number of anomalous situations, which need to be addressed.

In addition to problems related to restrictions on the share structure of corporate brokerages, a new issue has evolved which challenges the ability of the Ministry to effectively regulate all forms of agency. This development involves the recent and successful introduction into the marketplace of the franchise operation. In this form of brokerage, the registered broker is the purchaser of the franchise and not the franchisor. The franchisor provides an identifiable tradename, advertising and other materials for use in the operation of the brokerage, but is not presently regulated by the Ministry.

Although a franchise operation will likely appear to the general public to be similar to a corporate brokerage with branch offices, there are two very fundamental differences. First, there exists little or no control by a franchisor over day-to-day operations of the independent franchise operation. As a result, the perception of the public of a large corporate

umbrella is not necessarily a correct one. Second, franchisors are not required to be registered under the statute as they are not directly involved in a "trade". Thus, the Ministry has no direct control over their activities, such as advertising.

Proposed Direction

The Legislative Review Project proposes that the current restrictions on broker ownership of a corporate brokerage be reformed, using a more flexible discretionary approach. In this way, it would be possible to avoid most captive broker situations, while at the same time not imposing unreasonable share structure restrictions on corporations that do not present a risk to the protection of the public. A more flexible approach would avoid the ability to find a "loophole" in the restrictions, as has happened in the past. It is also proposed that the franchisor be brought within the regulatory framework of the legislation, through the establishing of a non-trading licensing category. Through this form of registration, such activities as advertising could be regulated by the Ministry in the same way that it regulates many activities of corporate brokerages.

7) Licensing and Education

The legislation provides for the licensing of real estate brokers and salesmen. As a result of increasing demands for a higher level of education and additional licensing categories, a number of practices and procedures, outside of the legislation and its regulations, have been developed on an ad hoc basis.

In the area of licensing, a major issue concerns the establishment of new licensing categories to recognize the more specialized and varied functions performed by registrants. An industry task force, after reviewing current licensing and education provisions, recommended a number of changes to the current licensing categories. Included among the recommended changes were the creation of a probationary period and new registration categories for associate brokers and office managers. In addition, the task force recommended the development of an Industrial, Commercial and Investment Specialty Licence, which would act as a prerequisite to trading in such transactions.

The most urgent issue with regard to education is the need to provide clear statutory authority for the education requirements. The current Act does not refer to any educational criteria for licensing. The regulations do, however, make reference to educational prerequisites for registration. In addition, although the Ontario Real Estate Association currently manages the delivery of education for prospective registrants, clear legislative authority for this delegation

does not exist.

The industry task force made a number of recommendations relating to the educational requirements. Its report proposed expanding the availability of the pre-licensing program through correspondence courses and the creation of an entry-level, prerequisite test similar to the L.S.A.T. and G.M.A.T. tests. Further, the task force recommended the addition of three 40-hour courses to be completed during the probationary period. Complementing the recommended creation of new licensing categories, the task force proposed additional 40-hour courses for each new category. Finally, the report suggested establishing a continuing education requirement of 30 hours every two years.

Proposed Direction

It is proposed that an additional registration category be created to recognize the achievement of the educational and experience requirements of a broker when a registrant does not wish to act in the capacity of a principal broker. This new category could address the need for a specific registration category for selling brokers and office managers. The review team does not propose that the recommendation of a probationary period be adopted. It is, however, proposed that the qualifying period for registration as a broker, associate broker or office manager be extended to three years.

It is proposed that the industry, in line with the proposed direction for co-regulation, be delegated the ability to create specialty certifications which would allow registrants to hold themselves out as specialists in fields, such as Industrial, Commercial and Investment. It is not, however, proposed that such certification be required before being entitled to enter into a specific type of transaction.

It should also be noted that under the issue of Forms of Brokerage, the review team proposed that a new non-trading licensing category be established. This category could initially address the registration of franchisors but could also address other related non-trading practices that may be perceived as requiring regulation in the future.

The Legislative Review Project proposes that the revised legislation be amended to specifically allow for a reference to educational requirements for the specific licensing categories.

It is not recommended that an entry exam, as suggested by the task force, be adopted. In line with the rejection of the proposal for the probationary period, it is proposed that the additional educational requirements recommended for probationary sales representatives be moved up into the pre-licensing program.

With regard to the suggestion of continuing education, it is proposed that, for non-specialist registrants, the suggested hours be reduced. For certified specialists, as proposed above, the industry could require a higher level of continuing education.

Finally, in line with the proposed direction for co-regulation, discussed above, the project proposes that an industry council be delegated the responsibility for administering a number of the responsibilities for licensing and education. However, the actual delivery of educational courses should not become monopolized within the industry.

8) Discipline and Enforcement

Presently, the responsibility for discipline and enforcement of the legislation rests with the Registrar. Two major developments have hampered the Ministry's efforts toward effectively implementing existing discipline and enforcement measures. The first is the rapidly growing registrant population, which places an increasing demand upon limited Ministry resources. The second is the increasing complexity of the real estate marketplace. This complexity has indicated the existence of a number of gaps in the legislation. In addition, it has made the formal process of taking a proposal for revocation of registration to the Commercial Registration Appeal Tribunal more complicated and time-consuming. This, in turn, has placed an additional strain on Ministry resources.

Regional boards, which are private, voluntary organizations, do carry out non-legislative-based discipline activities under their own bylaws. These activities, however, are focused to a large extent on settling disputes between members on matters such as commissions - that is, they do not have a direct public protection mandate. Due to the local composition of these boards, the public is often left with the perception that a lack of objectivity exists. Further, although the regional boards have an umbrella body in the Ontario Real Estate Association, there is a lack of uniformity in their discipline activities. Finally, not all registrants are members of the regional boards.

Proposed Direction

In line with the proposed direction of co-regulation, the Legislative Review Project proposes that authority to implement certain aspects of the discipline and enforcement provisions of the legislation be delegated to an industry council. All individual registrants would be required to be members of the council. To oversee the discipline and enforcement activities, an executive body of the council should be established with membership that is not exclusively industry-based. It could, for instance, include representatives from consumer associations, academia, and the legal

profession. Further, it is proposed that the Registrar have an ex officio position on this executive body.

The framework for the council's discipline and enforcement activities would include an agreed-upon code of ethics. The available remedies could include a suspension of membership in the Council and the decertification of members with regard to certain specialist qualifications.

With regard to the present powers available to the Registrar, it is proposed that the power of immediate cessation be added. Further, the review team proposes a number of additional changes designed to bring the present powers of the Registrar more in line with the Ministry's other consumer protection legislation.

9) Consumer Remedies

Currently, consumers who seek redress as a result of problems with a real estate transaction may consider three avenues of redress: the Ministry, the industry, and the courts. The Ministry does not currently have the power to provide redress directly to the consumer, but is limited to discipline and enforcement action against registrants. The legislation does require brokers to maintain a $5,000 bond which would be available to a consumer seeking redress. In today's real estate marketplace, however, such an amount is meaningless. The courts are available to consumers, but they do not provide a timely solution to a costly problem in which time is always of the essence. As a result, none of these routes effectively respond to the growing need of consumers for redress from losses.

The failure of the current bonding system generally underlines the need to ensure that registrants are financially accountable for their mistakes. This need clearly demonstrates the importance of the direct accountability of salespersons to their brokers. As a result, it appears necessary to address in the legislation the "deep pocket" liability of brokers to the public for their actions and the actions of their salespeople.

Proposed Direction

It is proposed that a compensation fund be developed to replace the existing bonding requirements placed on brokers. A compensation fund would more adequately reflect the economies of scale in the real estate industry, enhance public protection and serve as a self-policing mechanism within the industry.

It is also proposed that administration of the compensation fund be delegated to the industry council established pursuant to the proposed direction for co-regulation.

The review team further proposes that applicants to the compensation fund not be required to obtain a court judgement as a pre-condition to obtaining relief. Instead, it is proposed that the compensation fund act as an alternate avenue to consumers. Such a direction is in line with existing compensation funds within the mandate of the Ministry and would, therefore, provide a degree of consistency.

10) Trust Funds and Accounts

The Act requires that deposits presented to an agent be deposited in a broker's trust account within two banking days. This provision has been perceived as overly cumbersome by many registrants. Consequently, although the Ministry views the requirement as vital from a public protection perspective, it is almost impossible to police.

The industry argues that many offers will not have been accepted within the two business days allowed. If the broker has followed the Act and deposited the funds and the offer is not accepted, a prospective vendor may be prevented from making further offers until the bank clears the release of the funds. The common practice of the industry is to hold deposit cheques until an offer has been accepted.

Proposed Direction

The review team does not propose that the current practice be enshrined within new legislation. It is alternatively proposed that the two-day period be extended an additional one or two days. In addition, it is suggested that disclosure provisions be developed to facilitate the public's understanding of potential delays in processing deposit funds.

33. The Ontario New Home Warranties Plan Act

THE ONTARIO NEW HOME WARRANTIES PLAN ACT

BACKGROUND

The current New Home Warranty program (NHWP) is governed by the Ontario New Home Warranties Plan Act, and was established by the Ontario Government in cooperation with the building industry (HUDAC) in December 1976. The act's purpose is to provide deposit protection and to act as a construction guarantor. The program is administered by a non-profit corporation.

INFORMATION-GATHERING PROCESS

1) Letters to the Minister

A review was conducted of all the letters written to the Minister of Consumer and Commercial Relations in 1986 regarding problems of new home buyers. This represented 15% of all consumer complaints to the Minister and second highest number of complaints in a category.

These complaints can be broken down as follows:

Delayed closings	33%
Incomplete work	26%
Substitutions and defective/poor workmanship	31%
Concerns from municipalities and consumer groups	10%

Among the complaints concerning defective work, one-third included concerns about the effectiveness of NHWP as an alternative for resolving disputes. Concerns were expressed about the comprehensiveness of the new home warranty, particularly in matters involving contractual disputes.

2) Newspaper clippings

A review was made of all 1985 and 1986 newspaper articles relating to problems of new home buyers.

3) NHWP complaint files

A review was undertaken of 100 active complaint files (1986) of NHWP. The review indicated that most of the problems encountered by new home buyers after taking possession are incompletions, substitutions and shoddy workmanship. The review further indicated that in the majority of the files examined, the buyers identified two or more of those problems.

The breakdown of complaints in the 100 NHWP files is as follows:

Incomplete work	50%
Substitutions of colours and fixtures	30%
Poor workmanship, defective work	75%
Deficiencies deemed warrantable	30%

4) Other jurisdictions

Information was gathered from other jurisdictions about their new home buyers protection programs.

Of special interest was the British program. It is non-legislative and is run by a council with representatives from various professions. Builders are in a minority on the council. The basic coverage is for two years, with an additional structural damage warranty for a further eight years.

5) Interest groups

Input was obtained from Home-Aid, a consumer lobby group started by one dissatisfied home buyer, and the Consumers' Association of Canada. The Urban Development Institute and the Ontario Home Builders' Association also provided input.

6) Standard agreement

The standard agreement proposed by the Toronto Home Builders' Association was reviewed and analyzed.

The review team developed a standard agreement which will be balanced for both the consumer and the builder.

7) Standard clauses

Many Agreements of Purchase and Sale were reviewed. Based on this research, mandatory clauses were developed and proposed to be included in every agreement. Those clauses would provide disclosure, and address issues of delayed closings, substitutions and incompletions.

8) Ministry consultations

Numerous meetings were held with Business Practices Division and Policy and Planning Branch staff to discuss issues and proposed directions.

9) Review of decisions by the Commercial Registration Appeal Trubunal

A review was conducted of all CRAT decisions since 1979 which refer to NHWP appeals, particularly those pertaining to the warranty and compensation sections of the act. The purpose of the study was to review the ambiguous aspects of the

legislation, and the tribunal's interpretation of the NHWP Act.

10) New home/condominium purchaser's survey

The Legislative Review Project conducted a survey of 2,400 new home/condominium purchasers, who had taken possession of their homes during 1986. The results of the survey were based on 780 responses (33%).

The majority of respondents indicated that in their opinion, changes or improvements were needed to the warranty program and its administration. Some perceived the warranty as protecting the builder more than the consumer. There was also a feeling of frustration among respondents who were required to pay for a warranty which they felt provided little in return. Many respondents further commented on their inability to comprehend particular details of the warranty.

The results of the survey indicate that respondents had experienced problems in the following areas:

Delayed closing	48%
Incomplete work	59%
Substitutions, not agreed to by buyer	24%
Presence of additional defects in material and workmanship	88%
The quality of workmanship was not what was expected	51%

One section of the survey asked questions about NHWP.

Some of the results follow:

Number of purchasers aware of NHWP	90%
Number of purchasers aware of warranty only under the name of HUDAC	10%
Number of purchasers who contacted NHWP	28%
Number of purchasers who indicated NHWP took action, or action was in progress	68%
Number of purchasers who indicated NHWP took no action	32%

The question of whether there is a need to improve the New Home Warranty Program drew responses from 180 people:

Personnel should be more cooperative, expert, easier to contact	9%
Warranty should be more consumer-oriented and protective; currently too builder-oriented	11%
Should have more enforcement power to ensure builders comply with their responsibilities	37%
Terms and conditions need to be clarified and expanded	7%

GENERAL PROBLEM AREAS

Warranties are a common element in the purchase of most new consumer goods, particularly when such expensive items as appliances and automobiles are involved. For most Canadians, the purchase of a house is the single most costly purchase in their lifetime. However, relative to appliances and autos, new house purchases tend not to be as well protected by a comprehensive warranty.

Currently, purchasing a new house offers few concrete guarantees. Purchasers cannot be assured of taking possession on the contracted closing date; after possession, they may discover work that is incomplete, or that there are defects in materials used, and poor quality workmanship evident in the construction of the house. Furthermore, new home buyers have had difficulties getting these problems remedied by the builder.

There are also indications that the New Home Warranty Program may actually be contributing to the difficulties consumers experience when attempting to obtain effective recourse. The program's need to maintain a careful balance between the home building industry and the purchasers, as well as the lack of a clear mandate or accountability to the Ministry may be contributing to problems in interpreting and implementing warranty claims. Purchasers have indicated that they perceive the program to be more protective of builders than of consumers, as recent decisions by the program do not appear to be favourably disposed towards the consumer.

SPECIFIC ISSUES

1) Imbalance in Bargaining Power

The cause of many consumer problems is an imbalance in the bargaining power between the purchaser and the builder throughout the transaction. The Agreement of Purchase and Sale between the purchaser and the builder appears to be designed to protect the builder and not the consumer. These agreements result in purchasers carrying a disproportionate amount of the risk, should problems arise.

It has caused many problems for new home buyers, some of which are as follows:

a) Delayed closing

One of the major problems faced by new home buyers during 1986 and 1987 involved delayed closings.

Based on the assumption that a new house will be completed by the closing date agreed upon in the contract, new home buyers either sell their present house or give notice to their landlord. In many instances, however, consumers are later

informed that their new house is not finished and the closing date must be changed. Home buyers then find themselves required to make alternate living arrangements on very short notice. Temporary living arrangements generally involve added cost and inconvenience to the new home buyer.

The consumer's only recourse is to walk away from the deal. In a boom market, however, consumers cannot afford such a drastic measure, so are forced to deal with the unfortunate circumstances associated with delayed closings.

In the survey of new home purchasers, approximately half of the respondents (48%) experienced a delay in the closing date of their new houses. The most common reason given to the purchaser for delays involved problems with the builder (43%). Reasons included: builders' neglect to apply for building permits or register the subdivision; builders who over-extended themselves on the number of houses they committed to build; and bankruptcy. The second most common reason given for delayed closings involved market conditions (40%), such as strikes or labour and material shortages.

The majority of delays (60%) were less than two months (less than one month - 27%; one to two months - 33%). Only 1% of closings was delayed for more than 12 months.

Of those who experienced changes in their closing dates, 31% experienced one change, 38% experienced two or more changes and 8% experienced four or more changes.

Almost half (47%) of the respondents who experienced a delay in closing said that they were not given sufficient notice of the delay.

b) Incomplete work

A new home buyer may be expected to move into an incomplete house. Although it may take up to a year or two before the house is completed, he or she is still required to pay the balance owing at the time of closing. This represented a major source of frustration for new home buyers.

Fifty-nine percent of the respondents indicated that their houses were incomplete at the time of closing. Of this group, 35% provided a detailed list of incomplete work, including missing fixtures, doors, exterior stairs, patios and decks; and unfinished painting, touch ups, brickwork, landscaping and grading. Twenty-eight percent of the respondents indicated that items they had expected to be in the house were not there, such as vents, fans, mirrors, countertops and cupboard doors. Although several purchasers acknowledged the seasonal limitations of grading and landscaping, they were dissatisfied with the amount of time they had to wait for this work to be completed.

c) Substitutions

Under the current interpretations of NHWP's administration, substitutions are considered contractual items and are not covered by the warranty. This limits the methods of redress for unwanted substitutions and is a further source of frustration for new home buyers.

A common complaint involved the substitution of colours, on items such as tiles, bathroom fixtures, exterior brick, aluminum and shingling. Home owners were also dissatisfied with substitutions which were considered to be of a lesser quality, such as chrome bathroom fixtures rather than brass, a metal porch rather than wooden, the wrong size of air conditioner, or aluminum siding being used where brickwork was expected. Alterations in the actual design and size of the house were also given as examples of changes made to the Agreement of Purchase and Sale.

These substitutions were made without notification to the purchasers. Consumer satisfaction with a new house appears to depend on what was advertised, represented and agreed upon at the time of the signing of the agreement, compared to the appearance and contents of the final product.

2) NHWP and Warranty

a) NHWP's interpretation of the act

The warranty program (NHWP) appears to interpret the act and apply the terms and conditions of the warranty rather conservatively. Decisions appear to reflect a very narrow and restricted interpretation of the act, thereby giving the impression that the program makes decisions in favour of the builder. This frustrates new home buyers.

Those whose claims have been denied by the warranty program can appeal to the Commercial Registration Appeal Tribunal (CRAT). It appears that CRAT also accepts NHWP's interpretation of the NHWP Act.

However, in a recent decision, the tribunal raised the question of whether the continued rejection of claims is due to some inherent inequity in the statute over the years.

b) Board composition

The current board of directors of NHWP consists of more members with builder-related backgrounds than consumer-related backgrounds. There are currently no requirements regarding the composition of the board under the act or regulations; this may be perceived to influence the manner in which the corporation fulfills its responsibilities.

The builder orientation of the board may have exacerbated inconsistencies and limitations in the administration of the

warranty. From the purchaser's point of view, clauses and terms of the warranty are defined too narrowly. Since the terms in the act are vague and, in some cases, even contradictory, interpretations of the act and subsequent decisions made by NHWP have not, necessarily, been made in the consumer's interest.

c) Lack of accountability

Currently, there is no formal means of ensuring that NHWP carries out its mandate. Under existing provisions, the Ministry does not have the authority to direct, supervise or influence policies and bylaw regulations, as the exclusive power for these activities presently rests with NHWP. This situation appears to result in a lack of accountability on the part of NHWP, which may only serve to perpetuate the public's perception that the program is builder-oriented.

d) Limited scope of the warranty

The warranty provides that construction will meet the minimum standards set by the Ontario Building Code. However, the building code does not address all areas of consumer complaints, such as incomplete work or landscaping and exterior grading requirements. The scope of the warranty does not appear to go beyond the minimum requirements of the Ontario Building Code. This situation may perpetuate the contention that the warranty actually represents only partial protection.

e) Response time

There appears to be a problem with the length of time it takes for the builder to respond to purchasers' complaints. There are inconsistencies in the level of cooperation by builders with NHWP's requests to make repairs and fulfill the terms of the warranty. Home builders tend to wait until the one-year term of the warranty is complete before making any repairs. Consumers feel work should be repaired within a more reasonable period of time.

There are also cases involving NHWP that have persisted for one or two years before resolution. Purchasers are dissatisfied with the amount of time it takes for their complaints to be resolved. Current legislation does not provide time limits by which consumer problems must be addressed.

f) Inconsistencies

According to buyers, decisions made by the program lack consistency. For example, in a situation involving two houses with the same problem, one inspector decided the problem would be repaired, while the other inspector evaluated the problem as superficial and ruled that it was not covered by the warranty.

g) Certificate of Completion and Possession

On closing, buyers must sign a Certificate of Completion and Possession (CCP) after inspecting the new house listing all items that are in need of repair and completion (Reg. 726, Part II, s.3(1)). Consumers feel they are rushed through the inspection, and that defects are often unnoticed until regular use has been made of the house. The time allotted to complete the form has become a source of consumer problems.

This is an important point of contention, since there is a tendency on the part of NHWP to rely heavily on the information contained in the CCP in order to determine warranty coverage during the conciliation process. With so much emphasis being placed on the CCP during the conciliation process, it is of the utmost importance that the consumer be given ample time to accurately complete the form.

The value of the CCP cannot be over-emphasized. Generally, items or defects not listed on the CCP are not covered by the warranty.

h) Warranty period

Another reported problem involves the actual warranty period (s.13(4)). Homeowners feel that one year is not long enough for various types of deficiencies in workmanship (such as cracked concrete, leaky walls and fireplaces) to materialize.

A recent court judgment overturned a decision made by CRAT which had rejected a condominium corporation's appeal on the basis that it had not filed complaints about water damage from faulty construction within the 12-month period. The court found that one year was not long enough to discover the problems. The judgment indicates that it would be impractical for new home-owners to be required to discover the cause of problems such as water penetration within the first year of the warranty.

It is difficult to determine the number of justified complaints which have not been recognized because consumers were unable to file a report within the first year of the warranty. It is apparent from many CRAT decisions that complaints which fall short of the "major defects test" would have been successful, had they been reported within the first year.

i) Enforcement

NHWP's willingness to use its and enforcement powers is also perceived to be minimal. Since the program's inception 10 years ago, 973 registrations have been revoked.

It is the builder's responsibility to enroll new houses with the program, to inform the purchaser about the warranty, and

to ensure that the Certificate of Completion and Possession is completed at the time of closing. There is, however, no penalty for builders who fail to disclose information regarding the warranty, even though the builder may be the only accessible source from which a purchaser can receive such information.

It would appear that the program has made limited use of provisions for disciplining builders who do not comply with the act. Currently, the most severe penalty involves the revocation of a license. Additional enforcement powers included in the regulations could also be used by NHWP to resolve problems with incomplete work and shoddy workmanship. For example, if the provisions prohibiting a builder from breach of contract (s.14(a)) were fully utilized, builders could be disciplined for not completing work or for making unsatisfactory substitutions, that is for failing to perform the contract.

The program could take a more disciplinary approach with builders by closely monitoring the number of conciliations and complaints for poor quality material and workmanship that are levied against individual builders. A builder's previous record of workmanship is currently not part of the qualifications for registration. A builder's past record of performance in the building industry could be used as a criterion for application for, or renewal of, a license.

New powers of suspension within the act could allow NHWP to suspend a builder's license, to ensure unfinished work and repairs were completed prior to the initiation of any new construction.

j) Legislation

A review of the act highlighted specific sections of the statutes and regulations which currently, when used, provide less than an optimal level of protection for new home buyers. The lack of clear definitions and standards has resulted, from the purchaser's point of view, in an ambiguous warranty. To ensure adequate consumer protection, the terms and conditions of the warranty form need to be clarified and standardized in order to remove the ambiguities and broaden the scope of the legislation. The major problems with the legislation focused upon definitions, contradictions and substantive issues.

- The term "fit for habitation" (s.13(1)(a)(ii)) has led to disputes as to what condition it must be in before the warranty takes effect. The phrase, which has been defined narrowly by NHWP, has led to building deficiencies being characterized as "cosmetic", and subsequently denied warranty coverage. The idea of "fit for habitation" has become a point of contention between purchasers' perceptions of what is "fit" and the program's interpretations regarding the severity of defects;

- The phrase "constructed in a workmanlike manner" (s.13(1)(a)(i)) is vague and appears to be interpreted narrowly. The program should rely more on this phrase when addressing shoddy workmanship complaints;

- "Major structural defects" (s.13(1)(b)) is another major area where problems and misrepresentations associated with the warranty exist. Consumers feel that cracks in basement walls and floors and in brickwork, which do not necessarily develop within the first year of occupation, are a cause for concern and should be remedied under the warranty. The phrase "major structural defects" should be clearly defined;

- S.13(2)(d) of the act states that "normal shrinkage of materials caused by drying after construction" is not warrantable. This is an ambiguous phrase for home owners who do not know what normal shrinkage in a new house means;

- S.14(1) of the act provides for compensation to the purchaser where there has been a loss resulting from "the vendor's failure to perform the contract". This presents two problems. First, this phrase could be narrowly interpreted to refer only to a failure to close the transaction. This would mean that once the transaction was closed, the owner could not be compensated for unfinished work. Second, if the contract provided for the vendor's obligations to cease upon closing, the failure of the vendor to perform any obligations would not be caught by this section after closing;

- Contradictions in the legislation may have resulted in conservative decisions made by NHWP and subsequent confusion for purchasers. There are contradictions between section 13(2)(1) and 13(6). The first provides for an acceptance of surface defects, as is stated in writing by a purchaser on the Certificate of Completion and Possession. This appears to be in conflict with section 13(6), which precludes any agreement or waiver purporting to nullify the warranty;

- Section 14(1)(a) of the act provides that any person is entitled to compensation out of the guarantee fund for damages resulting from bankruptcy of the vendor or from the <u>vendor's failure to perform the contract</u>. However, under Regulation 726, Part II, 6.3, new home owners are excluded from receiving money from the guarantee fund for incomplete work. Unfinished work is in the true sense a breach of contract.

  The builder's responsibilities under the contract should not be merged or negated by closing the transaction; i.e. the purchaser does not accept incomplete work as satisfactory by closing the transaction and taking possession of the house. Section 14(1)(a) provides NHWP

with the authority to ensure that unfinished work will be completed at the builder's expense. If this section were interpreted and utilized to its fullest potential, it could, in combination with all other powers, be used successfully in resolving problems associated with incomplete work and shoddy workmanship by citing the builder with failure to perform the contract.

PROPOSED DIRECTIONS

1) Addendum

To bring a balance to the Agreement of Purchase and Sale, it is proposed that the following be used as an 'addendum' to all Agreements of Purchase and Sale. This can be achieved by NHWP requiring that this addendum be used as a condition of registration. A copy of the draft addendum is included as an appendix.

There are two parts to the addendum. The first provides essential information to the purchaser prior to signing the contract.

The second lists a number of necessary clauses which will balance the risk involved.

Briefly, there are three important clauses related to the three larger identified problem areas:

- Delayed closing - the clause will provide for liquidated damages in case of delayed closing;
- Incomplete work - the clause will provide for holdback of part of the purchase price in cases where a purchaser has to take possession of the new home even though the home needs more work by the developer;
- Substitution - the clause will provide for what can or cannot be substituted by the developer without the consent of the purchaser.

2) Develop a Program Mandate or Philosophy

The program presently lacks a clear statement of philosophy, which is necessary if it is to be a true warranty program.

Any preamble to the legislation should include a statement on the philosophy and purpose of the legislation. An example would be:

a) To establish fair trade practices and to ensure that the four principles established by the Legislative Review Project are met:

    - Reasonable disclosure;

- o Transactional fairness;
- o Fair value;
- o Consumer remedy/redress;

b) To improve the quality of construction through education and research.

This is a broader scope than the current act allows. As in the British system, causes of common defects and problems could be monitored and researched to upgrade standards. Guidelines could be given to builders to improve building standards. Ongoing monitoring and evaluation of the program would keep the program in line with the building industry and technology.

3) Bring More Balance to the Board of Directors of NHWP

The proposed direction is that the board have more balanced representation from all concerned parties, as in the Travel Industry Compensation Fund. The model recommended is the British system, in which the council is composed of 1/3 builders, and 2/3 others, including consumers, municipal representatives and lawyers). It is also proposed that balanced representation on the board be included in the statute, so that it cannot be changed.

4) Provide for Accountability of NHWP to the Ministry

Increased accountability is proposed with respect to the program as a whole, and its financial position. Although the program receives consumer dollars, it is currently not required to account for these funds. The program is given its mandate through government legislation; therefore, it should be accountable to the legislature through the Ministry. The monitoring of the program should be done through the offices of provincial and/or Ministry auditors.

5) Expand the Scope of the Warranty

The warranty should ensure conformity of the product to the description of implied quality. The final product should be of acceptable quality, having regard to the description, price and other circumstances of the sale. This would cover problems such as shoddy workmanship, incompletions and substitutions. The warranty should raise its expectation above the minimum Ontario Building Code standards.

6) Time Limit for Response

It is recommended that NHWP speed up the conciliation process involved in resolving disputes. A time limit of one month after the conciliation request has been filed by the purchaser is recommended.

It is proposed that NHWP state clearly (as a result of the conciliation) the work to be performed by the builder.

It is also recommended that the builder be required to correct all deficiencies within one month of the conciliation process.

7) Improve Operational Procedures and Processes

The operational procedures of NHWP do not appear to be consistent. Guidelines should be developed for interpreting the conditions of the warranty, in order to ensure consistent application.

8) Move time for CCP

There should be two CCP forms, the first one to be filed at the time of possession and the second to be filed one month following possession, to identify other problems not found at time of the first inspection.

9) Increased Duration of the Warranty

A one-year warranty does not appear to be long enough for various types of deficiencies to materialize (e.g. cracked concrete, leaky walls). Consideration should be given, after additional analysis, to extending the terms of the initial warranty to accommodate problems which do not usually materialize within the first year. The proposed direction is to follow the British model of a two-year initial warranty and an additional eight-year warranty for major structural defects.

10) Improved Enforcement Powers of NHWP

NHWP needs to be more vigilant in utilizing and implementing its powers of enforcement, which currently exist in the legislation. It needs to take more action against builders who are not fulfilling their responsibilities.

In addition to current provisions, additional powers are needed for NHWP to monitor its registrants. The registrar should have the same powers as in other regulatory acts (e.g. Motor Vehicle Dealers Act, or Real Estate and Business Brokers Act, in which inspectors have access to the books and records of the registrant in order to monitor compliance with the act. NHWP should be provided with powers to monitor builders' financial integrity on an ongoing basis (as with travel agents). Provisions to freeze builder's accounts or utilize the Construction Liens Act, would be methods to ensure consumer protection against bankruptcy.

Other proposals for strengthening the program's enforcement powers include:

- Section 7 of the act - It may be possible to more effectively use the current provisions for considering "past conduct" as grounds to refuse registration of a builder. A past record of poor workmanship could be

determined by the number and severity of previous complaints filed against the builder;

- Section 9 of the act - Interim suspension powers may be one way of controlling the number of sales a builder wishes to complete. Such a provision would allow the registrar to temporarily suspend a builder's registration. The suspension would ensure the builder completes current work contracts before negotiating any new contracts;

- Section 11(2) of the act - The enforcement provisions for noncompliance with disclosure responsibilities to the buyer (the disclosure of the program, warranties, fees, etc) are limited, and could be strengthened;

- Section 22(1)(b) of the act - The current list of offenses is also limited. One alternative may be to include offenses for any contravention of the act rather than for specified sections. In order to enhance compliance with the provisions of the act, it may be necessary to increase minimum penalties;

- Section 23(1) of the act - In order to be consistent with other registration Acts, enforcement powers could be given to the Ministry in conjunction with provisions for the Lieutenant Governor to make all regulations.

11) <u>Improved Statutory and Regulatory Language</u>

- It is proposed that the phrase "fit for habitation" be removed altogether and replaced with the concept that a house should be of the quality and design that was represented at the time of the initial contract or in the vendor's promotional material, advertisements and other representations;

- It is proposed that 'workmanlike manner' be defined as follows and the definition included in S.1 of the act:

  "'workmanlike manner' means constructed to the functional and aesthetic standards represented to the owner by the vendor;"

- It is proposed that amendments be made to the definition of "major structural defects" as defined in S.1(o) of the regulations. The amendments recommended are to S.1(o)(i) and S.1(o)(ii) of the regulations and read as follows:

  "... (i) that results in damage to the load- bearing portion of any building or materially and adversely affects its load-bearing function, or (ii) that materially and adversely affects the use of any part or portion of such building for the purpose for which it was intended ...;"

- A definition of "normal shrinkage" should be included either in the legislation or in the NHWP documents, which are given to every new home buyer;

- To improve the scope of "the vendor's failure to perform the contract" in S.14(1)(a), it is recommended that the section should be amended to read in the last line of S.14(1)(a) following the word "perform" -- "any obligations under the contract notwithstanding the merger of such obligations". This amendment would make it clear that the section referred to a number of separate obligations under the contract;

- It is proposed that S.13(2)(1) be deleted from the act;

- It is recommended that the S.6(3) of Part II of the regulations be changed to read:

  "An owner who has a claim under clause 14(1)(a) of the act in respect of a construction contract is entitled to be paid out of the guarantee fund, for all damages against the builder for financial loss, an amount equal to all damages to the home to a maximum aggregate limit of $20,000".

ADDENDUM TO AGREEMENT OF PURCHASE AND SALE

IMPORTANT

THIS DOCUMENT CONTAINS IMPORTANT INFORMATION FOR THE CONSUMER

This document contains the following two parts:

I Disclosure Statement

The purpose of the Disclosure Statement is to draw your attention to certain terms and conditions in the Agreement of Purchase and Sale which is attached to this Addendum. Specifically, these are terms and conditions that may allow the Builder to cancel the Agreement and keep your deposit, or take other steps that you may not anticipate. This Statement is also meant to bring to your attention some other clauses which you should be aware of.

II Mandatory Contract Terms

The Mandatory Contract Terms are clauses that protect you the purchaser and must be in every Agreement of Purchase and Sale. These minimum clauses cannot be removed or changed by you or the Builder.

I

DISCLOSURE STATEMENT

THE PURPOSE OF THIS DISCLOSURE STATEMENT IS TO DRAW YOUR ATTENTION TO CERTAIN TERMS AND CONDITIONS IN THE ATTACHED AGREEMENT OF PURCHASE AND SALE. AFTER READING THIS STATEMENT YOU SHOULD READ THE ENTIRE AGREEMENT AND CONSULT AN ONTARIO LAWYER BEFORE SIGNING IT. THE AGREEMENT WILL SET OUT ALL THAT THE BUILDER IS OBLIGED TO DO IN CONSTRUCT- ING YOUR NEW HOME. THE AGREEMENT MAY ALLOW THE BUILDER IN SOME CASES TO CANCEL THE AGREEMENT AND KEEP ALL OR PART OF YOUR DEPOSIT.

The following terms may exist in your Agreement of purchase and sale and the numbers in brackets will tell you which paragraph the terms are in the Agreement:

A. The Builder may cancel the Agreement and keep your deposit if you do the following:

i) fail to provide proper information to the Mortgage company where you are arranging financing through the Builder;

(_____)

ii) assign the Agreement of sale to another person other than your spouse without the approval of the Builder;

(_____)

iii) fail to make colour selections or option selections within 21 days of being asked to make the selections;

Paragraph "1" of the Addendum

iv) register any lien, instrument, or notice of Agreement of Purchase and Sale on title before closing;

(_____)

v) breach any term or obligation in the Agreement;

(_____)

B. The Builder may cancel the Agreement and return your deposit without interest for the following reasons:

i) the home is damaged during construction;

(_____)

ii) the Builder cannot get Municipal or Provincial approvals necessary for construction to proceed;

(_____)

iii) the Mortgage company designated by the Builder does not approve your application;

(_____)

iv) if you have a valid objection to the title of the land that the Builder will not satisfy;

(_____)

v) breach any term or obligation in the Agreement.

(_____)

C. For items not listed on Schedule "A" the Builder can substitute materials and alter the plans and specifications used in construction of the home so that you may not get the same type of materials or finishing that you thought you were purchasing. This can be done without notice to you;

Paragraph "1" of the Addendum

D. You may be required to move into your new home before the exterior work and some internal finishing is completed;

(_____)

E. The final payment on closing shall be increased or adjusted on the closing for items in the Agreement related to Land Transfer Tax, which will be payable on closing;

(_____)

F. You may not be entitled to arrange your own financing for the home. You may be obliged to finance the purchase through a mortgage company designated by the Builder. The rate payable on the mortgage may be subject to increase.

(_____)

G. i) A Plan of Subdivision containing the property

(check one) _____ has _____ has not

been registered;

ii) a Building Permit for the property

(check one) _____ has _____ has not

been issued.

H. The Agreement may provide that the only warranty covering your new home is that provided by the Ontario New Home Warranty Plan. This warranty will cover the correction of certain defects up to a maximum amount of $50,000.00. Any additional expenses will be borne by you;

(_____)

I. The Ontario New Home Warranty Plan provides the following coverage for a period of one year after you take possession;

Every vendor of a home warrants to the owner

a) that the home,

i) is constructed in a workmanlike manner and is free from defects in material,

ii) is fit for habitation, and

iii) is constructed in accordance with the Ontario Building Code;

b) that the home is free of major structural defects as defined by the regulations; and

c) such other warranties as may be prescribed by the Regulations under the Act.

J. The warranty coverage described in paragraph "I" above does not apply to the following;

a) defects in materials, design and workmanship supplied by the owner (Purchaser);

b) secondary damage caused by defects, such as property damage and personal injury;

c) normal wear and tear;

d) normal shrinkage of materials caused by drying after construction;

e) damage caused by dampness or condensation due to failure by the owner (Purchaser) to maintain adequate ventilation;

f) damage resulting from improper maintenance;

g) alterations, deletions or additions made by the owner (Purchaser);

h) subsidence of the land around the building or along

utility lines, other than subsidence beneath the footings of the building;

i) damage resulting from an act of God;

j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

k) damage caused by municipal services or other utilities;

l) surface defects in workmanship and materials specified and accepted in writing by the owner (Purchaser) at the date of possession.

K. The Ontario New Home Warranty Plan provides a five year warranty from date of possession against major structural defects. This is defined as "any defect in workmanship or materials":

i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or;

ii) that materially and adversely affects the use of such building for the purpose for which it was intended.

L. The Ontario New Home Warranty Plan provides a guarantee on your deposit should the Builder fail to perform this Agreement. This guarantee is limited to $20,000.00 and any amount of deposit over this will not be guaranteed.

II

MANDATORY CONTRACT TERMS

The following five clauses are mandatory terms and conditions and form part of the Agreement of purchase and sale between:

_____ ("Purchaser")

and

_____ ("Vendor")

dated _____ (the "Agreement")

CONSTRUCTION

1. The Vendor agrees that it shall complete the House in accordance with the plans and specifications available for viewing by the Purchaser at the Vendor's sales office and that it shall perform all work and services in a good and workmanlike manner, appropriate to the style and nature of the house.

The Vendor covenants to diligently take all reasonable steps to construct the house without substitution of materials, colours or alteration of plans and specifications. The Purchaser may select first, second and third choices for those items, features or specifications listed in Schedule "A" of this Agreement. Where the Vendor is unable to provide any of the choices for an item, feature or specification listed in Schedule "A", the Vendor will notify the Purchaser and the Purchaser will have the option of cancelling this Agreement. The Purchaser must exercise this option to cancel the Agreement within twenty-one (21) days of the Vendor's notification. The option must be exercised in writing to the Vendor. The deposit will be returned to the Purchaser with interest and without deduction and all rights and obligations of the parties under this Agreement shall be at an end.

Where alterations or substitutions are necessary for any items, features or specifications not listed in Schedule "A" of this Agreement, the Vendor may substitute other materials of equal or better quality for those specified and may alter the plans and specifications, provided that such substitution or alteration shall not diminish the value of the Real Property or substantially alter the house and are of a minor nature unless the Vendor first obtains the Purchaser's previous consent. This applies also to materials and colours selected by the Purchaser below if the Purchaser's selections are not reasonably available at the time of construction and it is not reasonably feasible to seek new selections by the Purchaser.

If a dispute ever arises between the parties as to the necessity or quality of alterations or substitutions, the Vendor shall bear the onus of demonstrating that the covenants contained in this paragraph were complied with, failing which proof the Purchaser shall be entitled to damages.

The Purchaser shall be entitled to reasonable access to the Real Property.

The Purchaser shall have twenty-one (21) days after written request by the Vendor to complete the selection of colours and materials from the Vendor's samples, failing which the Vendor

may treat the Purchaser as being in default and terminate this Agreement or may exercise all of the Purchaser's rights to colour and material selection and such selection by the Vendor shall be binding on the Purchaser. The Vendor's selections shall be of equal or better quality than the regular samples offered by the Vendor.

The written request shall be sent to the Purchaser by registered mail.

Hot water heater and tank may not be included in the purchase price if rented.

Extras shall be paid for in advance and such payment shall be non-refundable if this transaction is not completed due to the Purchaser's default and the Vendor has or will incur any cost in relation to the extras.

Where the transaction is not completed due to the Vendor's default, monies paid by the Purchaser for extras, shall be refunded to the Purchaser.

If any extra is omitted, the Purchaser shall be credited with the amount which the Purchaser was charged for it and this shall be the limit of the Vendor's liability.

COMPLETION

2. For the purposes of closing only, the Property shall be deemed to be completed when all interior work has been substantially completed so that the building reasonably may be occupied, notwithstanding that there remains exterior work to be completed including, but not limited to, painting, driveway paving, grading, sodding and landscaping.

Where the Property is deemed to be completed for the purposes of closing and actual work remains outstanding and incomplete, the Purchaser shall on closing, retain a holdback amounting to five (5) per cent of the purchase price. This holdback shall be held in escrow by the Purchaser's solicitors to be paid out to the Vendor when all outstanding work on the Real Property is completed.

Where outstanding work remains to be completed on the Real Property twelve (12) months after the closing date, the holdback shall be paid out to the Purchaser and the Vendor remains obligated to complete the outstanding work.

In the event of a dispute between the parties as to whether all work is completed, the dispute shall be decided by a certified Ontario Architect (or Professional Engineer), agreed upon by the parties.

In the event that the parties cannot agree upon the appointment of an Architect (or Professional Engineer) within

thirty (30) days of either party requesting such appointment by letter, either party may by letter, request that the Ontario New Home Warranties Program appoint an Architect (or Professional Engineer) to decide the dispute. Upon such request the Ontario New Home Warranties Plan will appoint a certified Ontario Architect (or Professional Engineer) to decide the dispute.

The decision of the Architect (or Professional Engineer) will be final and binding on the parties for all purposes and the costs of the Architect will be paid by the party who loses the dispute.

CLOSING

3. The Vendor agrees that all work and construction on the Real Property will be substantially completed before the closing date.

Where the Vendor has not satisfied this obligation by the closing date, the Purchaser will be entitled to damages. The Parties agree that the Purchaser shall be entitled to the following reductions in purchase price as liquidated damages and not as penalty. The Parties further agree that such liquidated damages will be in full settlement for all damages arising out of the Vendor's failure to meet the agreed upon closing date and cover moving expenses, storage costs, change in property value, mental suffering, loss of enjoyment, legal costs, out-of-pocket expenses and any other miscellaneous costs or damages.

The parties agree to adopt the following calculation of liquidated damages as an expedient and efficient method of quantifying complex damages, which bears a reasonable relationship to actual projected damages.

Liquidated damages for the purpose of this paragraph will be calculated as follows:

a) one half per cent (1/2%) of the Purchase Price for each month of delay up to 3 months; and thereafter

b) one per cent (1%) of the Purchase Price for each month of delay up to 6 months; and thereafter

c) two per cent (2%) of the purchase price for each subsequent month of delay until closing, or until the Agreement is terminated, whichever occurs first.

If the Vendor is unable to complete the Real Property for the purposes of closing within (twelve) 12 months of the agreed closing date, the agreement will terminate. Upon termination, the vender will be deemed to be in breach of the Agreement and will pay to the Purchaser as liquidated damages:

a) The deposit with interest and without deduction;
b) The accumulated penalties.

Upon payment of these monies, all rights and liabilities between the parties under this Agreement will be at an end.

Where the house is damaged, the Vendor will be granted an extension of the closing date up to four (4) months during which the provisions of this paragraph do not apply. The extension of time should equal the amount of time required to repair the damage, and shall be mutually agreed upon by the parties.

In the event of a dispute between the parties as to the length of the extension period, the dispute shall be decided by a certified Ontario Architect (or Professional Engineer), agreed upon by the parties.

In the event that the parties cannot agree upon the appointment of an Architect (or Professional Engineer) within thirty (30) days of either party requesting such appointment by letter, either party may by letter, request that the Ontario New Home Warranties Program appoint an Architect (or Professional Engineer) to decide the dispute. Upon such request the Ontario New Home Warranties Plan will appoint a certified Ontario Architect (or Professional Engineer) to decide the dispute.

The decision of the Architect (or Professional Engineer) will be final and binding on the parties for all purposes and the costs of the Architect will be paid by the party who loses the dispute.

INTEREST

4. The Purchaser shall be paid interest on the deposit on closing. This amount shall be credited to the purchaser in the closing statement of Adjustments.

Interest shall be paid at a rate to be determined as follows:

a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings accounts on the 1st day of October of that year.

NON-DISCLAIMABLE AND MERGER

5. This Agreement shall be binding upon the heirs,

successors, administrators and assigns of each party and the obligations of each party shall survive Closing.

This Addendum is non-disclaimable and may not be amended or deleted. Where a particular clause of the Agreement is inconsistent with this Addendum, the particular clause in the Agreement will be null and void and this Addendum will prevail.

YOU SHOULD NOW READ THROUGH THE ENTIRE AGREEMENT AND CONSULT AN ONTARIO LAWYER BEFORE SIGNING IT.

34. The Ontario Condominium Act

THE ONTARIO CONDOMINIUM ACT

The Condominium Act was initially passed in the 1960's, and was subject to one review and subsequent amendments in the late 70's. The purpose of the Act is to provide a conceptual framework and guide to condominium ownership in Ontario. The Act further establishes minimum rights, remedies and protection for all unit owners.

I. INFORMATION GATHERING PROCESS

The information-gathering process conducted during the review of the Condominium Act may be broken into three categories. They involved an extensive literature review, consultations, and an expert panel discussion.

A) Literature Review

The information-gathering process began with a literature search and review of relevant academic materials and texts. In addition, relevant legal texts and court decisions were examined. Newspaper clippings and articles presented in the Condominium Magazine, and recent TV news reports and radio announcements were also reviewed. A search for pertinent information from Ministry correspondence, followed by a review of information gathered from the province's regional Consumer Services Officers was also conducted during the project's research efforts.

i) Other Jurisdictions

A comparative review of condominium legislation in other provinces was conducted to determine similarities and differences in overall presentation and approaches to particular issues. A comparative review of some American condominium legislation was also conducted.

ii) Interest Groups

The information-gathering process also included a review of formal recommendations presented to the Ministry of Consumer and Commercial Relations regarding changes to the Condominium Act. These included submissions by: The Association of Condominium Mangers of Ontario (ACMO), "Proposed Changes to the Ontario Condominium Act and Addendum"; The Canadian Condominium Institute (CCI) and the Canadian Bar Association (CBA), "Proposed Amendments to the Condominium Act"; The Institute of Chartered Accountants (ICA); The Urban Development Institute (UDI) in conjunction with The Ontario Home Builders Association (OHBA), "proposed amendments to the Condominium Act"; Durham Region Condominiums Association; Royal LePage (Residential Division for Ontario); and York Condominium

Corporation #76 (Crescent Town), presented in partnership with Andrew Wallace, President of Browell & Wallace Limited.

B) Consultations

To obtain a clearer understanding of the Condominium Act and the issues identified as requiring a detailed examination, a number of consultations were planned and implemented. They involved meetings with representatives of the Ministry of Consumer and Commercial Relations, Ministry of Municipal Affairs, Ministry of Housing, industry representatives, condominium lawyers, condominium unit owners and condominium corporation Boards of Directors.

i) Ministry consultations

Ongoing consultations with staff of the Business Practices Division, responsible for administering the Condominium Act, were conducted in an attempt to obtain a clearer understanding of the philosophy applied, and the Act's usefulness and limitations. In addition, meetings with representatives of the Ministries of Housing and Municipal Affairs were conducted to obtain a perspective on areas of shared interest and responsibility.

ii) Public Consultations

To obtain a better understanding of the issues facing new condominium owners/buyers and condominium corporations and developers in today's and tomorrow's markets, a representative sample of condominium corporations was contacted by letter. Approximately 10 percent of the 250 condominium corporations contacted responded.

A survey to research problems associated with new home buyers, new condominium owners and the New Home Warranty Plan Act was also designed and administered to a representative sample of 1986 new home and condominium buyers. (This survey and the results are discussed in detail in the previous section, of this Report related to the Ontario New Home Warranty Plan Act).

In addition, numerous meetings and telephone conversations were conducted with members of the Ontario Home Builders' Association, the Urban Development Institute, the Canadian Condominium Institute, condominium unit owners, condominium corporation Boards of Directors, condominium lawyers, and a Toronto Star columnist, who responds to consumer inquiries on the Condominium Act, and other condominium-related issues. The ongoing consultative process ensured that the concerns of the associations and individuals involved in condominium issues and condominium living were clearly understood and considered by the review team.

The following issues were identified but determined to not be

within the mandate of the Legislative Review Project:

- the pre-selling of condominiums;
- the process of registering condominiums, including receiving the necessary approvals from different ministries.

These issues are being addressed at another level by the Ministry of Consumer and Commercial Relations.

C) Expert Panel Discussions

To obtain further input on the nature of the issues prior to the development of policy direction papers, an informal round table discussion was planned.

The one-day expert panel discussion was held in Toronto, on July 15, 1987, with representatives from the Legislative Review Project, the Ministry of Consumer and Commercial Relations, and industry and consumer groups. A detailed list of the participants is as follows:

List of Participants in the Expert Panel

Floyd Honey	-	York Condominium Corporation No.76
Joan Huzar	-	Consumers' Association of Canada
Gerald Hymen	-	Canadian Condominium Institute
Audrey Loeb	-	Canadian Bar Association
Jutta Maloney	-	Canadian Condominium Institute
Steve Martin	-	MCCR, Legal Services Branch
John Oakes	-	Royal LePage (Condominium Property Manager)
Jeff Pacey	-	Pacey, Deacon and Spears
Margaret Pollard	-	York Condominium Corporation No.457
Penman Smith	-	MCCR, Condominium Information Officer
John Switzer	-	Urban Development Institute
Staff Members	-	Greg Mazuryk, Sudhir Handa David Scriven, Beverley O'Connell Boecker, Janet Hope Roney, Roger Beattie

NOTE: The Ontario Home Builders' Association was invited. However, a representative was unable to attend.

II. GENERAL PROBLEM AREAS

Since the enactment of the Condominium Act, numerous changes have taken place within the condominium market. Sales have increased tremendously and what was once viewed as being a risky housing venture has now become a popular living arrangement for Ontario homeowners and investors.

Condominium living is not, however, without its problems. As part of the review team's mandate, a study of the Condominium Act was undertaken to determine the key issues and problems associated with condominium living and the act.

III. SPECIFIC ISSUES

As a result of the information-gathering process, nine general issues were identified. These issues are briefly described below.

1) Philosophy

In order to make decisions with regard to the issues identified below, it was first necessary to define the purpose of the legislation so as to provide a conceptual framework and guidance to condominium unit owners.

2) Condominium Bureau

The current lack of a statutory condominium body has raised questions regarding the need for a central body to provide an array of services to condominium owners.

3) Proxies/Quorums/Elections/Bylaws

There is concern that the legislation's intent to encourage owner participation has not achieved the desired results. Problems associated with obtaining quorums and the use of proxies have resulted in apathy and a perfunctory attitude toward the administrative functions involved in running a condominium corporation.

4) Reserve Funds

The current legislation, which requires the establishment of a "special account", does not appear adequate in its ability to protect condominium owners from the financial hardships associated with unexpected repair bills.

5) Interim Occupancy Period

The components of occupancy costs, as presently expressed

in the legislation, needs to be reviewed to respond to such issues as "ghost mortgages". Other related issues involve the obligation of developers to pay interest on purchasers' funds held in trust.

6) Licensing of Property Managers

The maturity of the condominium industry has encouraged the growth of condominium property managers and the need to review accreditation programs.

7) Adult-Only Buildings

Many adult-only condominiums have been marketed and developed. Now, as a result of recent amendments to the Ontario Human Rights Code, they are subject to uncertainties which need to be reviewed.

8) Insurance Issues

The existing Condominium Act adopted a unique approach to insurance, by requiring the condominium corporation to insure an owner's unit, except for "improvements and betterments". There is now a need to use the practical experience of owners, condominium corporations, and the insurance industry to revise the legislation, making the insurance provisions more effective.

9) New Concepts for Condominiums

The concepts of Expandable Condominiums/Phased Developments and Vacant Land Condominiums, although the subject of previous studies, require further review and discussion. A summary of studies, concepts and the concerns associated with them, as recognized by the Legislative Review Project, will be prepared for later identification of policy alternatives and ensuing recommendations.

IV. PROPOSED DIRECTIONS

1) Philosophy for Condominiums

As a result of the research, it was observed that there is a need for an overall philosophy for condominiums. Such a philosophy would facilitate the development of guiding principles to be used in the evaluation of alternative responses to indentified issues.

To fulfill this need, the review team has developed an overall philosophy for condominiums. The dual concepts involved in condominium living, a suggested legislative approach and guiding principles have been defined. In addition, the three primary functions of the Condominium Act are enumerated.

- **'Dual Concepts'** - There are two concepts associated with condominium living: i) a business venture, in which owners purchase a unit and an undivided interest in the common elements; ii) a community, which in many ways reflects a municipality. Thus, condominium living involves a combination of private homeownership and common property ownership.

  In fact, the legislation represents a legal hybrid which incorporates certain functions of a business corporation and a municipality. To encourage the concept of common property ownership and the participatory responsibilities inherent in condominium living, the Condominium Act must be amended to reflect the dual aspects of condominium living.

- **'Legislative Approach'** - Based on the fact that it should not be the Ministry's responsibility to monitor the performance of condominium owners, but rather to provide information and guidance, the Condominium Act should be declaratory rather than regulatory in its approach. A Condominium Act which incorporates a "hands-off" approach, through the expression of a framework outlining the respective responsibilities and rights of individuals who choose condominium living, will work to ensure the growth of independent- ly operative and responsible condominium corporations. Thus, it is proposed that in the provision of a statutory basis for the concept, the Condominium Act take a declaratory approach.

- **'Guiding Principles'** - To facilitate the implementation of a declaratory approach, the following principles were used as a guide to determining appropriate responses to issues. Efforts were made to: i) provide a degree of flexibility, to allow for the design and operation of a condominium in a way which best serves the needs and interests of the unit owners; ii) ensure clarification of the rights and obligations of all interested parties; and iii) ensure the legislation is presented in a clear format, using plain language.

- **Function** - Based on the concept of condominium living and the declaratory approach just outlined, the Condominium Act's primary functions will be to:

  i) create a concept of condominium ownership; ii) provide information regarding the procedural process involved in the creation, operation and termination of a condominium corporation; and iii) strive to create a balance between homeownership and a communal lifestyle.

By including an expanded awareness of the communal aspects involved in condominium living, the Condominium Act will strive to encourage greater participation among owners, and provide a mechanism geared toward promoting a sense of

individuals working for the good of the whole.

ii) A Bureau for Condominium Owners

Many condominium unit owners and board members who are unfamiliar with the Condominium Act and the process involved in running a condominium corporation find it difficult to find guidance when faced with the responsibilities of condominium living.

A legislated centralized condominium association, whose objectives would be to provide advice, information, and education, along with a possible dispute resolution system, would provide condominium board members and unit owners with a resource centre required to serve condominium unit owners in today's growing market.

Proposed Direction

The Legislative Review Project proposes that a Condominium Bureau, which is supportive of and does not infringe upon the declaratory approach of the Condominium Act, be introduced. A Condominium Bureau, structured to be at arm's length from the Ministry, providing information, advice, education and a possible dispute resolution system, will help to ensure the effective implementation of the Condominium Act and the smooth functioning of all condominium corporations.

Following a review of numerous funding approaches designed to support a Condominium Bureau, the two preferred alternatives proposed for further examination are:

i) Shared Funding - whereby an apportioned funding formula would be agreed upon between the Ministry and individual condominium corporations;

ii) User Pay Service - whereby the Ministry would provide deficit funding to be offset by a charge that would be paid when services are rendered.

However, before the Ministry makes a final decision, the review team proposes that a detailed operational strategy be developed.

iii) Quorums, Proxies, Elections and Bylaws

- 'Quorums' - Often, owners and board members report that it is very difficult to obtain the quorum required to hold a general or annual meeting without the use of proxies. If a meeting is called and a quorum not reached, board members tend to leave the meeting and go knocking on doors in an attempt to collect the number of voters or proxies required to hold a meeting. If they fail to obtain the

quorum required, the board is then forced to postpone the meeting until a later date. Also, under the present Act, quorum requirements for the second meeting do not differ, resulting in a perpetuation of the problem.

- **'Proxies'** - Under the present Act, no requirements regarding proxy solicitation exist, nor are there any limitations or restrictions required on their use. Unit owners do not have to specify how their proxies are to be used. This causes problems for individuals who attend strictly on their own behalf.

There are also problems associated with the use of proxies and proxy solicitation on the part of some board members, owners and mortgagees who obtain large numbers of proxies to ensure that their vested interests in a condominium corporation are met.

Unit owners feel that the abuse of proxies is of particular concern when board members essentially re-elect themselves at the annual meeting. In addition, meetings which are called for the purposes of passing by-laws and are controlled by proxy often anger unit owners. There is concern that the only way quorum requirements can be obtained is through the use of proxies, that the use of proxies inadvertently encourages apathy among condominium owners, and that through their use (as they now exist with no limitations or restrictions) by-laws are passed, which may not represent the opinion(s) of the majority of unit owners. It is felt that these practices may supercede the will of the majority and create undesired difficulties for those who are unable to alter the questionable behaviour of a few.

Proposed Direction

- **Quorums** - The review team proposes that the legislation be amended to reduce the quorum requirement for the first meeting, and allow those in attendance at the second meeting to constitute a quorum. This would help to eliminate some of the problems experienced by board members, when trying to organize a meeting.

- **Proxies** - The review team proposes that the legislation be amended to restrict the use of proxies to a particular meeting rather than allowing them to be held in perpetuity, and to ensure that the issues to be discussed and voted upon are clearly outlined on the notice of a meeting. This will help to eliminate some of the problems presently associated with the use of proxies and proxy solicitation.

- **Elections** - It is proposed that the legislation be amended to eliminate the use of proxies for the purpose of electing board members, and that two alternate election procedures be introduced. Condominium corporations would be able to choose one of the following two procedures:

be able to choose one of the following two procedures:

i) a special meeting organized solely for the purpose of electing members of the Board of Directors; or

ii) a municipal-style election format which would be organized according to the rules and regulations of the Municipal Act.

- **By-laws** - The review team proposes that the legislation be amended to require the use of specified proxies at meetings called for the purpose of passing by-laws. Notice of a meeting should enumerate the by-law(s) to be voted on and have attached ballots on which owners would check-off the option(s) of their choice.

iv) Reserve Funds

Section 36 of the Condominium Act requires that all condominium corporations establish a "special account", commonly referred to as a reserve fund, from unit owner contributions. The purpose of the fund is to cover repair and replacement costs. The legislation requires that it be based on the life expectancy of various components of the building, any recreational facilities and the grounds area.

There is concern that the intent of the legislation, which is to protect condominium owners from the financial hardships associated with unexpected repair bills, has not been fully achieved. Within this concern, a number of specific issues were identified and reviewed. They include the purpose of the reserve fund, minimum requirements and special assessments, use of interest earned and investment.

The following represents an examination of these issues in detail.

- **The Reserve Fund's Purpose** - A lack of understanding regarding the differences between Section 36 and Section 38 of the Condominium Act appears to be causing problems for some corporations and unit owners in ascertaining the purpose of reserve funds. The word "renovation" in Section 38 is interpreted by many board members to include changes involving "repairs and replacements" and has prompted questions regarding the appropriate use of reserve funds for work approved under Section 38.

- **Minimum Requirements and Special Assessments** - It appears that the minimum contributing of 10% of the annual common expenses required by the legislation to be deposited in a separate reserve fund is insufficient for some condominium corporations. Reportedly, many condominium corporations have been caught unawares, because the deteriorating conditions of various common elements were not carefully monitored. Under these circumstances, special assessments are required and unit owners are then forced to pay the

difference between the funds available and the funds required. Though necessary, special assessments can cause serious financial hardships for some unit owners.

- **The Use of Interest Earned on the Reserve Fund** - Another area of concern for condominium corporation board members and unit owners involves the application of interest money earned on reserve funds. Section 36 of the Act provides no guidelines for the use of such interest money. Some unit owners believe it should remain part of the reserve fund, while others believe it should be withdrawn and re-deposited in the common expense account.

- **Investment of Reserve Funds** - A further area of concern for condominium corporation board members and condominium lawyers involves the determination of acceptable investment practices for reserve funds. At the present time, the legislation does not address the issue of investment of reserve funds.

Proposed Direction

To ensure adequate levels of funds are available for the repair and replacement of common elements, the review team proposes that the legislation be amended to require that reserve fund studies be conducted by all condominium corporations. The first reserve fund study would, however, be the responsibility of the developer and included in the list of items to be turned over to the new Board of Directors following registration of the corporation. The condominium corporation would then be required to conduct a new reserve fund study every three to seven years. Reserve fund studies have the ability to more adequately reflect the individual repair and replacement costs of a condominium corporation than an arbitrary minimum.

To eliminate present confusion, the review team proposes that a new subsection be added to the Act, regarding the use of interest earned on the reserve fund. Interest money will remain a part of the reserve fund until the maximum amount required by the reserve fund study is obtained. After attaining the maximum required, any additional interest earned on the fund can be redirected to the common expense account.

It is proposed that all reserve funds be required to be invested in Schedule A banks, Trust Companies or Government Securities located in Ontario.

The Act should also be amended to include a clear explanation of the reserve fund's purpose to cover the repair and replacement costs associated with a condominium corporation's common elements. Also, to eliminate any further confusion over the differences between a repair or replacement and a renovation, the word "renovation" as used in Section 38 of the Act should be deleted.

v) Interim Occupancy Period

The ability of the developer to transfer title to the purchaser of a unit in a new development is dependent upon the registration of the condominium. Under the present legislation in Ontario, a condominium cannot be registered until all the units in the proposed development are substantially completed. Individual units in a condominium are, however, regularly completed to a degree sufficient to allow for occupancy prior to registration of the condominium. For financial reasons, developers include in the purchase and sale agreement a requirement that purchasers take possession of their units upon completion, even though the condominium is not registered. As a result, a number of purchasers are required to take possession of their new units without title.

The Condominium Act includes a number of provisions which address this period of interim occupancy without title. One provision requires that a developer pay interest to the prospective purchaser on monies held in trust. This interest obligation runs from the time a purchaser takes possession of a unit until the time that title is transferred.

Another provision limits the amount of "rent" that may be collected from a purchaser in possession during this period. This provision describes three components of an allowable occupancy fee that may be charged by a proposed declarant. The three components comprise an amount for municipal taxes, common expenses and an "interest" payment. Problems with regard to the interest component have developed. Due to the language describing the "interest" component, purchasers who have arranged their own financing or wish to pay cash do not have to pay this component.

The fact that not all purchasers are subject to all three components of the occupancy fee, in combination with a statutory obligation on the developer to hold in trust and pay interest on monies advanced by a purchaser, results in a serious restriction on the financing options available to developers. As a result, they have been forced to create a mandatory provision in their purchase and sale agreements, referred to as a "ghost mortgage". These are designed to ensure that all purchasers are subject to the three components of the allowable interim occupancy fee.

Ghost mortgages have created a number of consumer concerns due primarily to their fictional nature. That is, purchasers do not know why they cannot pay cash for their unit or why they must assume a mortgage that they do not want or need. From the point of view of developers, ghost mortgages are an unfortunate but necessary tool required to offset their own financing costs. In addition to these concerns is the fact that the current language of the legislative provision for occupancy costs results in a discrimination against purchasers, depending upon the type of financing they use to purchase their unit. This is a serious issue which must be

addressed.

Three financing options are generally available to purchasers. The first is to accept financing offered by the developer. The second is to arrange financing independently or cash to be paid upon receipt of title. The third option is to pay all cash, to be applied to the balance of the purchase price prior to receipt of title, usually upon taking occupancy of a unit before the condominium is registered. The review team's proposed direction addresses these three types of purchasing options.

Proposed Direction

It is proposed that the interest component of the interim occupancy fee be reformed so that purchasers who will be paying the balance of the purchase price upon final closing will be subject to this component regardless of whether the purchaser selects financing other than that offered by the developer.

It is proposed that the legislation clearly express that a developer is not allowed to include an interest component in the occupancy fee of an all cash purchaser; that is, a purchaser who wishes to pay the balance of the purchase price before taking possession.

When a developer holds a purchaser's funds in trust, it is proposed that the developer pay interest to the purchaser calculated from the date the funds are received until the purchaser takes possession.

It is proposed that the forms of prescribed security allowing a developer to release funds held in trust be expanded to include an irrevocable letter of credit and any other equivalent forms of security that can be determined through agreement with developers and Ministry officials.

vi) The Licensing of Condominium Property Managers

The growth of the condominium market in Ontario has led to the creation of a maturing condominium property management industry. The Condominium Act does not, however, expressly set out the respective roles and responsibilities of the members of the Boards of Directors and condominium property managers. Further, recently identified problems relating to the unacceptable conduct of a few condominium property managers has highlighted the need to clarify their future role and responsibilities.

The related issue of licensing condominium property managers also raises questions regarding the role and responsibilities of both trade associations and the government. Do the associations have the ability to monitor the condominium property management industry and be self-governing, or is

government intervention required; if so, to what degree?

Proposed Direction

The Legislative Review Project proposes that the Condominium Act be amended to allow for the licensing of condominium managers, with the specific licensing requirements outlined in the Regulations. However, it is not proposed that condominium corporations be required to hire only licensed property managers. The introduction of optional licensing requirements will encourage a new level of professionalism throughout the industry and provide the market with an array of condominium property managers who have acquired varying levels of education, knowledge and experience.

It is also proposed that the responsibilities of condominium Boards of Directors be clarified to ensure condominium property managers do not have access to condominium corporation trust funds.

vii) Adult-Only Condominiums

The approach to this issue does not follow the traditional format of other issues identified and discussed by the review team. The main reason for this deviation is that the issue of adult-only accommodations addresses a concern that is not limited to condominium owners. Instead, it affects accommodations in general, including rental units. Further, the issue requires an examination of the impact of recent amendments to the Human Rights Code, 1981, which is beyond the mandate of the Ministry of Consumer and Commercial Relations.

Recent amendments to the Code have created a great deal of uncertainty for condominium owners. Current owners are uncertain over whether the adult-only rule in their buildings can still be enforced. Prospective owners are unsure whether the adult-only units they wish to buy, will remain so.

Proposed Direction

It is determined that the legitimacy of adult-only condominiums essentially requires responses on two levels. The first involves a clarification of the uncertainty regarding the effect of the 1986 amendments to the Human Rights Code. The second involves the issue of whether developers have the right to establish adult-only restrictions in a declaration. The review team proposes that the Ministry of Consumer and Commercial Relations attempt to address the first of these two levels; that is, the uncertainty of present and future unit owners of adult-only or similarly marketed condominiums. It is not proposed that the second level be addressed through the context of condominium legislation.

viii) Insurance

The importance of insurance for condominiums has grown proportionately with their popularity. Although it was once very difficult to obtain insurance specifically designed for condominiums, the insurance industry has rapidly adapted to the need for such coverage. The collective experience of corporations, unit owners, insurers, and adjusters with the Condominium Act has, however, created an awareness of a number of problems with the current insurance requirements.

Included among the identified issues were the delineation of insurance obligations, improvements and betterments, coordination with the repair and maintain provisions of the act, the nature of the policy required, and rights of subrogation.

Condominium legislation generally requires that property insurance be maintained. The nature of these provisions may, however, differ as a result of varying responses to two related questions: who obtains the coverage and what must be insured? Ontario's legislation requires that the corporation "maintain insurance on its own behalf and on behalf of the owners of the units and the common elements". The property which must be insured is not all inclusive, as the Act excludes "improvements and betterments made or acquired by an owner".

It is important to note that the practice of requiring a corporation to insure all or even part of a unit is unique to the concept of insurance, as the corporation is being asked to insure property in which it does not have a traditional ownership interest. As a result, most condominium legislation includes a specific provision expressing that the corporation has a sufficient insurable interest.

Most jurisdictions take a similar approach to the Ontario legislation, on the delineation of insurance obligations with regard to the common elements. A number of alternatives, however, are used with respect to the insurance obligations for the units. Some jurisdictions leave this obligation entirely in the hands of the unit owners, whereas others require the corporation to insure when the units are of a connected nature, such as in a highrise building.

The concept of "improvements and betterments", terms which are not defined in the Act, has raised a number of issues. The identification of what is and is not included within this phrase has become one of the most difficult problems experienced with regard to condominium insurance. As time passes from when the original owner of a unit takes possession through subsequent resales, the ability to identify improvements and betterments gradually diminishes. If better quality fixtures are acquired, it is not clear whether an owner would receive credit for the original value. As all of the original fixtures and finishes age, it would be easy to argue that even

replacement with equivalent quality would be an "improvement" and, thus, the owner's responsibility.

The Act includes a provision, separate from the insurance provision, which expresses the respective obligations of the corporation and the unit owner to repair and maintain the common elements and the units. This provision allows flexibility, so that the obligation to repair and maintain may vary from corporation to corporation. The insurance provision, on the other hand, is not flexible; under it, the obligation rests entirely with the corporation (except for "improvements and betterments"). This disrepancy must be resolved.

Another issue is that the act describes certain required components of the insurance policy that the corporation must obtain. These components may not, however, be available in the marketplace. Further, there is no specific reference to certain standard provisions. This leads to concerns over whether they are an appropriate element in the policy.

The Act does not address the issue of subrogation, which is a matter of concern considering the communal nature of the condominium relationship. Generally, a unit owner is considered a "named insured" and thus an insurance company could not bring an action against a unit owner(s) to recover its damages. A standard industry provision has developed, which describes when subrogation rights may exist against a unit owner. These provisions may be supplemented or contradicted by corporation by-laws, leading to a great deal of confusion.

Proposed Direction

The review team proposes that the existing delineation of insurance obligations continue, but suggests that they be expanded to include an element of flexibility for condominiums which are not physically interconnected. This proposed direction coincides with a further proposal to ensure that the provisions relating to the obligations to "repair and maintain" in Section 41 be coordinated with the obligation to insure.

It is also proposed that the legislation be amended to require declarants to prepare a list of standard finishes and fixtures to facilitate the identification of improvements and betterments. A copy of this document could be required to be provided to the owner's Board of Directors at the turn-over meeting and made available to all present and future unit owners.

With regard to the nature of the policy required by the legislation, the review team proposes that, instead of the current specified perils approach, an all risk policy be required with allowable deductions being listed in the

regulations for greater flexibility. It is further proposed that the legislation specifically allow for a reasonable deductible to be included in the policy and that the payment of such a deductible be the responsibility of the corporation and not individual unit owners.

To address subrogation concerns, it is suggested that a waiver provision, similar to that currently used by the Insurance Bureau of Canada, be included in the Act. It is further proposed in this regard that the notice of action provisions in Section 14 of the legislation be amended to exempt a subrogated action.

ix) New Concepts for Condominiums

Vacant Land Condominiums

Presently, a condominium is viewed by the legislation as being property with a structure (eg. multi-dwelling unit or townhouse). The concept of Vacant Land Condominiums, however, involves units comprised of land without a structure. The common elements would comprise the roads, parks, recreational facilities, etc. Any structure built on the unit, i.e. the land, would become a part of the unit, as would fixtures within a traditional condominium unit.

Vacant land condominiums have statutory precedents in British Columbia and Alberta, and were initially developed to facilitate mobile homes and trailer parks.

Some of the identified concerns associated with the development of the vacant land concept include:

- the potential need for assurances that the monetary value of houses built on Vacant Land Condominium lots be set within an acceptable range;
- a consideration of whether by-laws relating to the maintenance of the unit should include obligations with respect to any structure on a unit;
- the need for protection mechanisms for purchasers who contract for the building of a house prior to the delivery of title to the unit;
- whether all unit owners should be required to build a dwelling within a specified period at time.

In the past, the Ministry has, as a matter of policy, rejected the concept of Vacant Land Condominiums. Industry representatives have responded that they would provide the public with a valuable option not currently available.

Phased Development and Expandable Condominiums

At issue is the concern of developers that they will invest

large sums of money building a multi-structured condominium which will be larger than the demand for units. What they would like to do is to create Expandable Condominiums; that is, add more buildings as the demonstrated demand will support. As will be outlined below, this is not possible under the present legislation; as a result, developers use the rather awkward approach known as phased development.

The concept of Phased Development Condominiums involves two or more condominiums sharing common facilities of adjacent properties. This approach is supported by a series of complex easement and cost-sharing agreements among the adjacent condominiums. To be effective, the agreements must be prepared before the registration of the first condominium; that is, the first building of the phased development. If anything has been left out of the agreements, the developer is likely to encounter difficulties in attempting to have an owner Board of Directors agree to a contract which facilitates the sharing of facilities with future condominiums.

The major drawback to this approach from a public protection perspective is simply that the additional agreements are so complex and convoluted that it is unlikely that disclosure would add to prospective buyers' understanding of their future rights. When additional condominiums are established, then purchasers of units will be that much more dependent upon the various agreements which outline their rights. Thus, the whole process requires the original drafter of the easement and cost-sharing agreements to try to consider all contingencies.

The concept of Expandable Condominiums would avoid the need to place all reliance on existing complex agreements when adding new structures. Instead, it would allow for the creation of a condominium to which new buildings could be added. The major drawback to this approach is that it would appear to challenge the entrenched position of the declaration and description. Under the current act, for example, the declaration cannot be amended unless unanimous support is received.

Proposed Direction

The review team views the concepts of Vacant Land and Expandable Condominiums as being potentially valuable additions to the evolving nature of condominiums. In line with a mandate to take a proactive approach, the project proposes that a direction be taken with the intention of incorporating these new concepts into the legislation. However, as outlined above, these new concepts require further review and discussion, before detailed recommendations are formulated. It is suggested that through this new direction, the public can be provided with a greater array of housing options, without sacrificing the current level of public protection provided in the statute.

35. Home Improvements

HOME IMPROVEMENTS

BACKGROUND

As homes become older, and as prices in the new housing market continue to escalate, Ontario consumers are opting to spend an increasing amount of money on home repairs and renovations, instead of buying new homes.

It is estimated that four out of five consumers do some repair or renovation work on their home every year. More than one-third spend over $2,500 on these home improvements. Ontario consumers now collectively spend more money on home improvements than on the construction of new homes. In 1985, Ontario consumers spent $4.8 billion on home improvements.

At the same time, the increase in expenditures in the home improvement area has resulted in more complaints being made to complaint bureaus. In 1986, home improvements represented the largest single source of complaints received by the Ministry of Consumer and Commercial Relations.

GENERAL PROBLEM AREAS

1) Significant Number of Consumer Complaints

As part of its research, the Legislative Review Project conducted a review of the Ministry's 1986 complaint files. Out of approximately 12,000 files, 1,218 were reviewed. "Home Repair/Renovations" was the single largest source of complaints, representing 14.5% of the complaints reviewed by the project (176 out of 1,218 complaints). Based on these figures, it is estimated that the Ministry received approximately 1,760 complaints about home repairs/renovations in 1986. (Please see Appendix A.)

In 1985, complaints about "Home Remodeling, Construction and Maintenance" constituted 21.3% of all complaints filed with the Canadian Better Business Bureaus (Canadian Council of Better Business Bureaus, Statistical Survey of Better Business Bureau Activity in Canada, 1985, see Appendix B). Out of eight generic categories, complaints about home improvements ranked third in terms of frequency.

More specific categorizations of complaints were also listed in the annual Better Business Bureau report. The home improvement categories of "Home Remodeling Contractors" and "Paving Contractors" were among the bureau's "Top Ten Leaders" in terms of frequency of complaints. ("Home Remodelling Contractors" [renovators] ranked third, and "Paving Contractors" ranked tenth). Together, these two categories made up 7.6% of all complaints received by the bureau, for a total of 1,465 complaints.
(Please see Appendix C.)

2) Level of Consumer Dissatisfaction

In the Legislative Review Project's Consumer Opinion Survey (1987), consumers rated the services provided by home improvement contractors as between "average" and "fair". Home improvement contractors were rated 25th by consumer respondents on a list comprising 32 types of businesses offering consumer goods and services.

Approximately 42% of the respondents also completed an addendum questionnaire which asked specific questions relating to automobiles, credit, funeral services, travel, and home building and improvements. Approximately 10% of the respondents expressed dissatisfaction with home improvement contractors.

3) Types of Complaints

Research of Ministry complaint files reveals that the following eight categories represent the typical types of complaints made by dissatisfied consumers with respect to home improvements:

Substandard workmanship or materials

Consumers complain most frequently about improperly installed windows, drafty additions, cracked and crumbling asphalt pavement on driveways, faulty central air conditioning systems, unauthorized deviations from specifications in a renovation contract, etc. There is a wide variation in the complaints concerning quality. In most instances, these are brought to the Ministry's attention only after the consumer has failed in many attempts to obtain satisfaction from the contractor. In some cases, mediation by Ministry staff leads to a resolution of the problem. However, in many cases, involvement by the Ministry does not lead to a settlement of the complaint.

Failure to honour warranty obligations

Many home improvement contractors offer warranties on their work and materials, but then are unwilling (or unable, in the case of bankruptcy), to rectify problems that arise during the warranty period.

Delay

A substantial number of Ministry complaints about home improvements stem from delays in either commencing or in completing the work for which the contract was made. The delays vary from a few weeks to several months, and result in a significant level of frustration among homeowners, particularly in cases of substantial renovations. A review of consumer complaint files reveals reports about contractors

who spend only a few hours each day on the project, and about paving contractors who will not perform work for which consumers paid deposits until they are "back in the neighborhood".

On the other hand, contractors list many reasons for delay in completing projects, including inappropriate weather conditions, broken down equipment, shortage of materials, personal problems (illness or injury), and workers or subcontractors who have quit without notice. Contractors also suggest that some delays are due to specific requests from consumers to change plans and specifications written out in the contract.

Many reputable contractors suggest that the main reason for delay in the home improvement business, under normal circumstances, is poor time management. Some contractors "get over their heads" in work and must spread themselves out thinly over any number of projects at one time. This necessarily results in some projects being neglected, and in many consumers being inconvenienced and frustrated.

Costs in excess of estimates

Consumers complain about final contract prices exceeding original estimates, and about being charged for "extras" which they had thought were included in the contract price.

Contractors attribute these problems to misunderstandings or to unexpected developments such as the discovery of a rotting joist under a floor which must be replaced. The more established contracting businesses advise consumers to count on spending ten to twenty percent more than expected on any project to account for contingencies.

Failure to respond to complaints

Many consumers are unsuccessful in their attempts even to contact their contractors to complain about services rendered. Businesses have moved, or do not answer messages left on answering machines.

There is clearly a legitimate need for the use of answering machines and answering services in the home improvement industry, as the contractor often has no full-time staff and must spend most of the day at the sites of the projects. However, consumers experience a great deal of frustration when their attempts to express their dissatisfaction are disregarded by some contractors.

Deposits

Consumers are often asked by contractors to provide a deposit towards the home improvement project, prior to commencement. If no work is started on the project for a number of months, consumers often lose faith in the contractor and request a

cancellation of the contract and a return of their deposit. Some contractors refuse to refund the deposit.

The refusal for a refund is usually given on the basis that the contractor intends to eventually perform the contract, or the contractor has become bankrupt, or that cancellation should result in the forfeit of the deposit. In the event that a deposit is returned, it sometimes is done so only after many more months of waiting on the part of the consumer.

Bankruptcy

Some contractors become bankrupt because of an inability to run a business properly. It is a well known fact that turnover in the construction industry is high. The Metropolitan Toronto Licensing Commission licenses approximately 1500 home renovation contractors a year, whereas the number of licenced contractors at any given time normally does not exceed 5000. This indicates a fairly high attrition rate in the industry.

In addition, businesses which fall under the category of "special trade contractors" (this would include electricians, plumbers, etc.) accounted for 12% of all bankruptcies filed with Consumer and Corporate Affairs in 1984. This category is the third largest source of bankruptcies in the nation.

Contractor bankruptcies result in abandonment of projects, and lost deposits. In addition, subcontractors and materialmen may exercise liens on the consumer's home for unpaid wages and supplies.

In conclusion, the potential for bankruptcies in the home improvement industry represents a serious consumer protection issue.

Home Service Clubs

Many consumers have complained about "homeservice clubs" which operate in various cities across the province. These clubs act as "brokers" or as referral agencies for contractors. Consumers pay a "membership fee", usually $25, to join the club. In exchange, they have access to a 24 hour hotline which they may call in order to obtain names of contractors willing to perform repairs, usually emergency repairs, to the consumer's home. The contractors, in turn, must pay a 12% commission to the club in exchange for the referrals. The homeservice clubs appear to operate well provided that the consumer is satisfied with the quality of the work performed by the contractor. Problems arise, however, when the consumer is not satisfied. Despite a "guarantee" offered by the clubs as part of its members' benefits, consumers complain that the clubs sometimes disclaim liability for the contractor's work on the basis that the complaint is not justified. The club's position in

such a circumstance is that the contract is between the contractor and the consumer, and the club's role is limited to that of intermediary.

4) Unfair Practices

Unfair practices primarily relate to the sales techniques of the more unscrupulous businesses in the home improvement industry, and are likely not attributable to the majority of contractors who rely on repeat customers and references from friends, neighbors, and relatives.

There are numerous consumer complaints, however, related to unfair practices in the home improvement industry, which must be addressed in any attempt to review the effectiveness of legislation, of mediation and enforcement actions by Ministry staff, and of education programs in this area.

The following twelve categories of unfair practices have been determined to be problems requiring attention, as a result of the research by the Legislative Review Team:

Overcharging

The Ministry has received many complaints over the years related to contractors who charge excessively high prices for relatively minor home improvements. An example from the files is a roofing contractor who charged $5,000 for repairs actually valued at approximately $250. The elderly are often vulnerable in these situations, being least likely able to "comparison shop" to ensure that the price they are being charged is reasonable.

Unnecessary repairs

Some contractors have been known to talk consumers into entering into contracts for repairs that, unknown to the consumer, are unnecessary or of little value.

Charging for work not performed

This unfair practice has resulted in a number of complaints at the Ministry. An example is charging for installation of a chimney liner although no chimney liner was installed.

Substituting inferior materials

The practice of substituting lower quality materials for high quality ones continues among some contractors, an example being the use of paint outdoors which is not waterproof or intended for outside use.

Low or unclear estimates

Underestimating the full contract price by a significant amount, or not disclosing the full price by listing on the

contract only the price of the job per unit (e.g. in house siding, listing the price per square foot only), results in consumer complaints of unexpected costs once the final bill is received for payment.

Certificate of Completion

Some home improvement contractors require consumers to sign "certificates of completion" after the project, or parts of the project, are completed.

Certificates of completion in home improvements serve two purposes. In the case in which the consumer obtains a loan in order to finance the home improvement, a certificate authorizes the financial institution to release funds to the contractor. In other cases, a completion certificate signed by a consumer facilitates the exercise of a construction lien on the consumer's home by a contractor at a later date.

Some contractors are not properly using completion certificates by tendering them for the consumer's signature at the same time that the home improvement contract is executed. Since a number of documents may be signed at that time, consumers are not always aware that they are signing a completion certificate, and that, by doing so, they are waiving certain fundamental statutory rights.

High pressure salesmanship

Most reputable contractor businesses rely on their good reputations to attract customers, and stay in business due to their high quality workmanship.

As unscrupulous contractors generally have poor or non-existent reputations, they must rely on high pressure salesmanship to obtain customers. The Ministry has received complaints about home improvement salespeople posing as Consumers' Gas representatives, and about contractors advising consumers of "dangerous" levels of carbon monoxide being emitted by their furnaces, when this was found later not to be correct.

High pressure salesmanship, when attempted on competent and well-informed consumers, is often ignored, and the salesperson is usually dismissed. However, when this technique is practised on less well-informed and competent consumers, it often results in a contract for the sale of expensive home improvement work, which the consumer had not previously planned on prior to the visit of the salesperson.

Unreasonable payment demands

Consumers frequently complain about being required to make payments to contractors which may be unreasonable or premature.

Many contractors require at least 3 payments - a deposit at the time of signing the contract, a payment when the work is commenced, and a final payment when the work is completed.

In many cases, payments made on an unfinished project actually exceed the costs of the labour and materials expended to the date of the last payment. Consumers feel compelled to make the payments, however, as the contractor sometimes threatens to delay the project further or to abandon it completely until the payments are made.

Final payments are another consumer concern, as there exists a significant lack of public awareness of the right to withhold a final payment in order to cover possible construction liens.

Unreasonably large deposits

Deposits on home improvement contracts are sometimes as high as 50% to 75% of the full price of the contract, whereas the more reputable contractors, if they request any deposit, generally will not ask for more than 10%.

The risk to consumers with respect to unreasonably large deposits is that the consumer may lose all payments in the event that the business closes down or becomes bankrupt before the work is completed.

"Spiking"

"Spiking a job" refers to the practice, sometimes used by the less scrupulous contractors, involving performance of some work on the property as soon as the consumer agrees to the contract, followed by a significant delay in completion of the project.

An example would be the digging of a hole for the installation of a swimming pool upon agreement of the consumer to the proposed contract, with subsequent work being delayed or, in some cases, not being undertaken by the contractor. A consumer who might have cancelled the contract after an unreasonable delay or within the cooling-off period may decline to do so because of the cost of restoring the property to its original condition.

"Fly-by-nighters"

Many complaints concerning unfair practices relate to contractors who go out of business before completing the work, and who may re-appear later in the industry, using different business names and different addresses.

The issue with respect to the work performed by these contractors often becomes one of quality, rather than wilful intent to defraud. Consumers are usually left with forfeited deposits, shoddily performed work on the home which may

require considerable expenditures of money to restore it to its original condition, and no possibility of civil redress (i.e. the closed business often has no assets with which to satisfy a judgement).

5) Need for a reliable information service

The Legislative Review Project received a report from the Ontario Advisory Council on Senior Citizens, which emphasized the need for an "information service" available to seniors for the purpose of obtaining names of reliable contractors. The Council advised that, in the home improvements area, the primary concern expressed by seniors was finding competent contractors willing to do work for reasonable prices.

6) Vulnerability of groups such as senior citizens

A second group that made a submission to the Legislative Review Project with respect to home improvements was the United Senior Citizens of Ontario. The following is an extract from its brief, which evidences the nature of the concerns regarding the vulnerability of its constituency in this area:

> "... In a variety of cases it would appear that Senior Citizens are the particular target of abusive or dishonest sales practices. ... We would urge that the requirement for all door-to-door salespeople to be licensed, be strengthened in Ontario, especially to apply to sales in such areas as home repairs, etc., where senior citizens are often particular targets; all such salespeople should be required to provide the consumer with their license number, mailing address and telephone number in writing, along with a government telephone number where the consumer may call to verify the license.
>
> The cooling-off period, during which the consumer has the right to cancel any sales agreement at no cost and with no penalty, should be extended to one week's duration; this provides ample time for older people to seek the advice of younger relatives or others, who they may not be able to reach, within the current shorter cooling off period."

7) Consumer Losses

The home improvement industry represents a significant area of monetary expenditures by consumers. During the past fifteen years, money spent on home renovations in Ontario has more than doubled, reaching $4.8 billion in 1985, and surpassing for the first time money spent on the construction of new homes.

As the cost of purchasing homes escalates, more and more

consumers are deciding to renovate and upgrade their present premises instead of purchasing new ones. In addition, the high costs of entertainment, together with the increasing amount of leisure time available to consumers, are encouraging consumers to spend their leisure time at home. Having a comfortable and "up-to-date" home is becoming more and more of a consumer priority.

Consequently, the high level of expenditures on home improvements, combined with the large number of bankruptcies in this area, as previously outlined in this report, result in potentially significant consumer losses.

The requirement for a $5,000 bond from home improvement contractors, who are usually "itinerant sellers" under the present Consumer Protection Act, is insufficient to cover consumer losses. A compensation fund to reimburse consumers who experience such losses, which would spread the risk among all undertaking home improvement expenditures, needs to be addressed in the review of this area.

8) Deficiencies in the Applicability of the CPA

Confusion regarding registration requirements

The present confusion over which home improvement contractors must register under the Consumer Protection Act has led to industry apathy in abiding with the requirements under the act.

It is estimated that the number of home improvement businesses in Ontario is between 20,000 and 25,000. However, only about 2,000 "itinerant sellers" are presently registered under the CPA.

Poor definitions

The definitions of "itinerant seller" and "executory contract" under the act are difficult to understand, with the result that consumers and businesses are unclear as to who should register and why registration is required.

Insufficient penalties

Sellers are infrequently penalized for lack of registration, and the possibility of conviction under the act is relatively low. Unregistered sellers are not always rigorously pursued by Ministry staff, unless there is a consumer complaint on a specific company which is not registered. In such cases, Ministry staff routinely follow up the complaints with letters and blank application forms sent to the seller, in which the seller is advised of the obligation to register. The letters often are unanswered, or the seller moves without leaving a forwarding address.

Investigation and enforcement staff of the Ministry appear to

be reluctant to lay charges against sellers who, except for their failure to register, are otherwise conducting their businesses in a law-abiding fashion. If charges are laid and the matter proceeds to trial, the fines levied by the court for failure to register are often minimal (e.g. $100).

Insufficient disclosure requirements

The disclosure requirements under the present legislation are not regarded by many Ministry staff to be sufficient to ensure that the consumer makes a wise and well-informed purchasing decision. Information such as starting and completion dates, construction details concerning the quality of materials to be furnished, and warranties as to workmanship and materials, are not required to be disclosed in a written contract.

In comparison, disclosure laws with respect to home improvement contractors are much better in other jurisdictions, such as in California (i.e. the Home Improvement Business Law), and proposed for West Virginia (i.e. a home improvement bill was introduced in 1986 by the state Attorney General).

Inadequate financial protection

The most serious deficiency of the act, according to most Ministry staff interviewed on this topic, is its failure to ensure adequate financial protection to consumers whose contractors have neglected to complete the work contracted for, either because of insolvency or fraud.

The $5,000 bond is regarded as insufficient in a home improvement market in which contracts of up to $50,000 are not uncommon.

Ministry staff have suggested that a compensation fund entitling each consumer to at least $10,000, when justified, would be more equitable.

It is generally the view of Ministry staff that the establishment of a compensation fund in the home improvements area, together with a consumer publicity campaign, would ensure that consumers do not deal with contractors who are not registered with the compensation fund.

Lack of enforcement of the Act

Ministry staff spend considerable time trying to track down unregistered sellers and explaining to members of the industry why some members are being pursued for lack of registration and others are not followed up. Due to limited time and resources, prosecution for failure to register tends to be instituted only against those less reputable members of the industry.

The lack of enforcement of the act has also resulted in a general perception among the industry and among municipal

regulatory officials that the Ministry of Consumer and Commercial Relations is ineffective in its regulation of home improvement contractors.

9) Deficiencies in the applicability of the BPA

The definition of "unfair business practices" in the present Business Practices Act is too difficult for consumers and businesses to understand and apply in the home improvements area.

In addition, disputes over quality of workmanship, delayed completion, or failure to honour warranties are not covered by the act. These particular complaints constitute the majority of complaints regarding home improvement contractors.

Finally, there is no provision in the act authorizing a criminal court, upon conviction of a contractor, to order that the consumer be compensated for his/her losses. Therefore, a consumer may attend at the trial as a witness without ever succeeding in recovering the losses he/she experienced.

10) Lack of consistency in municipal regulation

Municipal governments in Ontario are involved in the regulation of the home improvement industry on two levels. The first is the enforcement of the Ontario Building Code, involving the issuance of building permits by municipal building inspectors and visits to worksites while the work is in progress to ensure that the safety provisions of the Code are being complied with. The second level of involvement by the municipalities is their licensing of certain home improvement trades, whereby specific businesses must obtain a license before practising in the municipality, and must pay annual licensing fees.

There is a wide variation, however, in the number of different trades requiring licenses from one municipality to another in Ontario. As part of the research for the Legislative Review Project, an informal survey was undertaken of the municipalities of Metropolitan Toronto, Sudbury, Hamilton-Wentworth, Guelph, Kitchener, London, Brantford, Windsor, Kingston, Ottawa, and Thunder Bay.

It was noted that electrical and plumbing contractors are licensed by every municipality surveyed. Apart from these two trades, however, there is little consistency in the types of trades regulated by municipalities. Metropolitan Toronto and Sudbury require licenses of the largest number of home improvement contractors.

Staff of municipal licensing commissions will mediate disputes between consumers and contractors concerning quality of workmanship, and will visit worksites to determine whether the project is being carried out properly.

Some municipalities, such as Metro Toronto and Hamilton-Wentworth, require home repair and renovation contracts to be in a prescribed standard form. Such contracts must be completed and signed before the home repair work is commenced, and must contain information such as names, addresses, and telephone numbers of the parties, a description of the work, the price, the completion date, and a guarantee that the work will "be completed in a workmanlike manner". Any changes to the manner in which the work is to be performed must also be confirmed in a new written contract before the work may take place. Finally, the Hamilton-Wentworth by-law states that down payments on home repair contracts may not exceed 10% of the contract price.

Municipal staff have expressed a number of concerns, however, with constraints in their regulation of the home improvement industry, and have recommended provincial legislative action.

One of the problems is the low level of fines for operating without a municipal license, which are inadequate to ensure compliance among some contractors.

Another concern is the fact that contractors successfully sued by the consumer often have insufficient assets with which to satisfy court judgments. Municipal staff have expressed a need for the province to establish rules to ensure consumer compensation in the event of business insolvency (i.e. a compensation fund).

A third problem with the municipal regulation of home improvements is constitutional. Municipalities are limited in their by-law enactment powers to powers which are specifically delegated to them by provincial statute. As there is no provincial enactment specifically authorizing municipalities to require tradespeople to pass written examinations, this requirement has recently been struck down by a court as being "ultra vires" the authority of the municipality. Municipal staff have expressed the need for the province to pass legislation specifically authorizing them to require successful completion of written examinations before a license will be granted.

In conclusion, the main problem is the lack of uniformity in regulation of the home improvement industry throughout the province. Many consumers who live beyond municipal borders are not protected, and the levels of protection provided to consumer living in cities varies widely from one municipality to another.

It appears that consideration should be given to a provincial home improvement law which is applicable to all Ontario residents, but which builds upon and strengthens the municipal regulatory mechanisms presently in place. Better co-ordination between provincial and municipal levels in the regulations of the home improvement industry would also appear to be a desirable objective.

OPTIONS

Is a specific provincial home improvements law necessary in view of the significant number of consumer complaints and the level of consumer dissatisfaction in the home improvement area? Options to address the problem in this area are as follows:

1) Training Program for Renovators

Recent initiatives at the industry level have included the formation of "Renovation Committees" by many of the home builder associations, in order to deal with the growing number of consumer complaints regarding home renovations. The Renovation Committee of the Ontario Home Builders Association (OHBA) has developed, together with the Ministry of Housing, a "professional development" training program for contractors doing renovation work, which may be available through community colleges in the near future.

The Ministry of Consumer and Commercial Relations should consider whether consultation with the home builders associations and the Ministry of Housing, to assist in the development and delivery of a training program for renovators, would be a viable means to reduce consumer dissatisfaction with home renovations.

2) Warranty Program

The four main components of a "warranty" program - registration, mandatory warranties, mediation services and a compensation fund - which now apply to new home construction, could possibly be extended to the home improvements area.

The Home Builders' Associations have recognized and investigated this possibility. To date, however, only the Quebec association has established such a warranty plan. However, as it is voluntary, it has not attracted many home improvement contractors. There are not immediate plans among the other Home Builders' Associations to extend such protection to consumers in other provinces.

The Ministry should consider whether or not it should encourage the home builders' associations to establish a voluntary warranty program for home renovations.

In addition, the Ministry should also question whether the Ontario New Home Warranty Plan Act should be amended to extend protection to consumers who undertake renovations to their homes. Home renovators would be required to register under the plan, and home renovation consumers would have access to the same warranties, compensation fund, and mediation services, which are presently available to owners of new homes.

3) Licensing

The province of Quebec, since 1975, has had in place a comprehensive licensing system for residential and commercial contractors operating in that province. Approximately 27,000 contractors are licensed, representing approximately 90% of the industry. The "financial solvency" reporting requirements of their act have resulted in a lower rate of bankruptcy in the industry. The main problem with the Quebec Act, according to its administrators, is its failure to provide redress to consumers who lose their deposits to insolvent or bankrupt contractors. This is because there is no compensation fund in place.

The Ministry of Consumer and Commercial Relations should question whether or not a licensing system for contractors, similar to that in Quebec, should be introduced in Ontario. Such a system, however, would require significant government funding, would place a heavy onus on government to discharge its "screening" function properly, and would not compensate consumers for significant losses in the home improvements area, unless it were supplemented by a compensation fund.

4) Consumer Protection Code

The Ministry needs to determine whether the existing Consumer Protection Act and the Business Practices Act, when revised and merged into a new "Consumer Protection Code", can be improved to sufficiently cover all of the problems in the home improvement industry. The generality of these statutes and the significant number of complaints regarding home improvements, however, likely mandate at least a separate chapter on this area in any new consumer protection legislation, if not specific and separate legislation.

5) Home Improvements Act

Finally, the Ministry should address the alternative of enacting a comprehensive "Ontario Home Improvements Act". Such a statute could include the requirement for registration of all home improvement businesses with the Ministry, could require more specific disclosure requirements in contracts with consumers, could introduce a special "shopping list" of unfair business practices unique to the home improvement industry, could introduce additional sanctions for businesses who fail to register, such as prohibition from taking legal actions against consumers, and could replace the present bonding system with a compensation fund.

PROPOSED DIRECTION

It is recommended that the Ministry of Consumer and Commercial Relations adopt the option of introducing a comprehensive "Ontario Home Improvements Act".

A comprehensive home improvements act could involve the following components:

Application of Act

- The act would apply to all home improvements. Home improvements would be defined as including:
  - installing or repairing roofing, siding, paving, windows, doors, chimneys, awnings, heating and air-conditioning systems, installed floor coverings, central vacuum cleaning systems, water softeners and purifiers, swimming pools, fire or burglar protection devices, wall covering, or fixtures of any kind, performing landscaping work, plumbing or electrical work, interior or exterior painting, or engaging in the renovation or repair of any portion of an existing home or noncommercial structure, building or grounds.
- "Home" would include a mobile home.
- The Lieutenant Governor in Council would have the authority to amend the definition by way of regulation.

Registration and Compensation Fund

- Every home improvement business would be required to register with the provincial authorities and to contribute to the compensation fund. Registration would be renewed at regular intervals (e.g. every one or two years).
- "Business" would include a home service club, but would not include salespersons.
- The compensation fund could be accessed by consumers, up to a $10,000 limit, in the following cases:
  - the consumer has an unsatisfied judgment against a home improvement business;
  - the home improvement business has gone bankrupt or has disappeared, and the consumer has thereby lost money;
  - there is a construction lien on the consumer's home by virtue of a contractor's debts to material suppliers or tradesmen.
- The $10,000 compensation ceiling could be amended by regulation.
- Home improvement businesses could be prohibited from entering into any contracts until they reimburse the compensation fund for any damages paid out on their behalf.

- Ministry officials might, upon individual request, provide members of the public with the following information:
  - whether or not a home improvement business is registered;
  - whether complaints have been filed against the business and if so, how many;
  - how the complaints were resolved.
- An exemption from registration could possibly be granted to businesses who are registered with an approved industry warranty program. This would encourage industry associations to establish their own programs.
- Registration would be granted unless the Registrar has reason to believe the applicant is not financially solvent or will not carry on his business with honesty and integrity, etc.
- Financial solvency could be established where the applicant's assets exceeds his/her liabilities by $5,000.
- A home improvement business who fails to register could be prohibited from:
  - maintaining legal actions;
  - asserting construction liens;
  - obtaining building or other permits;
  - obtaining municipal trade licenses;
  - any advertising, including listing his/her name in the Yellow Pages.
- Consideration could be given to prohibitions on extending home improvement loans to consumers who hire unregistered sellers, as done in the province of Quebec.

<u>Contract Disclosure</u>

- All home improvement contracts for $300 or more would be required to include the following information:
  - the business's name, street address, telephone number, and MCCR registration number;
  - a standard-form notice of the business's registration obligations, and MCCR's address and telephone number which the consumer can contact to verify registration;
  - a description of the work to be done, the materials to be used, and the equipment to be installed;
  - the full contract price, including all fees, charges or costs to the consumer;

- where payments are to be made in more than one installment,

  - o the deposit, if any, which cannot exceed 10% of the contract price, unless the home improvement goods to be installed must be custom-built away from the consumer's residence, in which case the deposit may not exceed 50% of the contract price;

  - o a schedule of payments, which payments cannot exceed the value of the work performed on the project at any time;

- the approximate commencement and completion dates;

- a minimum one year warranty on good workmanship and materials consistent with accepted trade standards. If the work or materials are not warranted, there must be a clear and conspicuous statement to this effect;

- any statements, promises or descriptions which constitute express warranties under the proposed Ontario consumer warranties legislation;

- a standard-form notice of consumer rights and obligations under the Ontario Construction Lien Act;

- a standard-form notice of consumer rights under Ontario's proposed door-to-door legislation;

- a statement that, if the home improvement is not substantially commenced within twenty (20) days of the commencement date, the consumer may cancel without penalty and the seller would be required to refund any monies paid to the seller under the contract;

- a statement that, where the work is not completed by the completion date and the delay is not due to events beyond the seller's control, the consumer may deduct from the contract price 1% for every day that the completion of the project is delayed, or such other penalty as may be established by the parties;

- a statement that the contractor is responsible for any deficiencies in materials or in work supplied by subcontractors, suppliers, or tradespersons.

o The home improvement contract would be required to be signed by the consumer and the business, and a copy given to the consumer at the time he/she signs it. Work could not be commenced on the project until the contract meets the requirements of this provision.

o Any amendments or additions to the contract would be required to be signed by the consumer and the consumer provided with a copy thereof before such additional work

is commenced.

- Where a home improvement contract for over $300 is divided into contracts for less than $300, possibly resulting in the evasion of the proposed legislation, it would be a requirement that each such contract comply with the disclosure requirements.

- Failure to comply with any of these requirements would render the contract unenforceable against the consumer. In addition, businesses whose contracts do not comply with the proposed legislation would be subject to prosecution.

Prohibited Business Practices

The following would be prohibited business practices in the home improvement industry:

- failure to substantially commence a project within twenty days of the commencement date or failure to complete the project by the completion date unless the project is delayed by events beyond the contractor's control or unless the consumer has consented in writing to the delay;

- failure to perform a quality of workmanship consistent with accepted trade standards;

- wilful deviation from or disregard of plans or specifications;

- representing to a consumer that the consumer's home will be used as a "model home" if such is not the case;

- representing that a consumer has been specially selected to receive a bargain or discount when such is not the case;

- inducing a consumer to sign a certificate of completion before the home improvement is completed;

- deceptively inducing a consumer to sign any document where the seller knows or ought to know that the consumer is unable to read or write, or does not understand the terms of the document;

- falsely representing oneself to be an agent of any government or public utility;

- falsely stating that a consumer's home or any part, fixture or appliance thereof is dangerous, defective, or in need or repair or replacement;

- falsely representing oneself to be a representative of a manufacturer or other organization, or that such manufacturer or other organization will assume some obligation in fulfilling the contract when such is not the

case;

- repeatedly failing to answer inquiries of customers or government officials;

- damaging the property of a person with the intent of entering into a home improvement contract;

- charging a price for work which price grossly exceeds the fair market value of such work, and for the purposes of this section "grossly exceeds" may be established where the price exceeds the fair market value by three times or more;

- deceptively charging a consumer for work which was not performed;

- providing an unreasonably low estimate for a home improvement project where the seller knows or ought to know that the project cannot reasonably be done for that price, and where the seller subsequently charges the consumer a higher price than the estimate;

- failing to disclose that any fixtures or goods being offered need additional attachments in order to perform the function claimed of them by the seller;

- including in any home improvement contract the following clauses:

  - any waiver of any rights available to a consumer under statute or regulation;

  - a clause acknowledging that the consumer has read and understood the contract;

  - a clause stating that the seller's representations are not binding;

  - a clause stating that the seller shall have sole authority for deciding whether or not a fact exists;

  - any unreasonable penalty clause against a consumer who cancels a contract.

- The Lieutenant Governor in Council may amend the list of prohibited practices by way of regulation.

Prepayments

Monies which a consumer pays in advance to a contractor would be required to be placed into trust until the home improvement is completed. Until completion, however, such funds could be used by the contractor to pay for expenses directly related to the home improvement.

Municipal Licensing

The governing legislation of each Ontario municipality would be amended to specifically authorize each municipality to require applicants for municipal trade licences to pass written examinations.

Consumer Remedies

- Violation by a seller of this legislation would give rise to a consumer's claim in damages.

- A consumer who successfully sues a seller under this Act would be entitled to:

  - $500 minimum damages;
  - the costs of the consumer's action;
  - the consumer's lawyer's fees.

- Where a home improvement contract is not substantially commenced within twenty (20) days of the commencement date, the consumer would be able to, in addition to the above remedies, cancel the contract without penalty and the seller would be required to refund any monies paid to him under the contract.

- Where a home improvement contract is not completed by the completion date and the delay is not due to events beyond the seller's control, the consumer would be entitled, in addition to the above remedies, to deduct from the contract price 1% for every day that the completion of the project is delayed, or such other penalty as established by the parties.

- The above provisions would not apply where the consumer has agreed in writing to an extension of the commencement or completion dates, and the work has commenced or completed by the revised date.

- The one year warranty would "run with the home." In other words, a subsequent purchaser of a home on which a home improvement has been performed would be covered by the same one year warranty as the consumer who sold the home.

- Home service clubs would be jointly and severally liable for the obligations of contractors who the clubs refer to consumers.

- A provincial offences court would be able, upon conviction of a seller for violation of this Act, to order that the seller compensate any consumer who has suffered damages as a result of the violation.

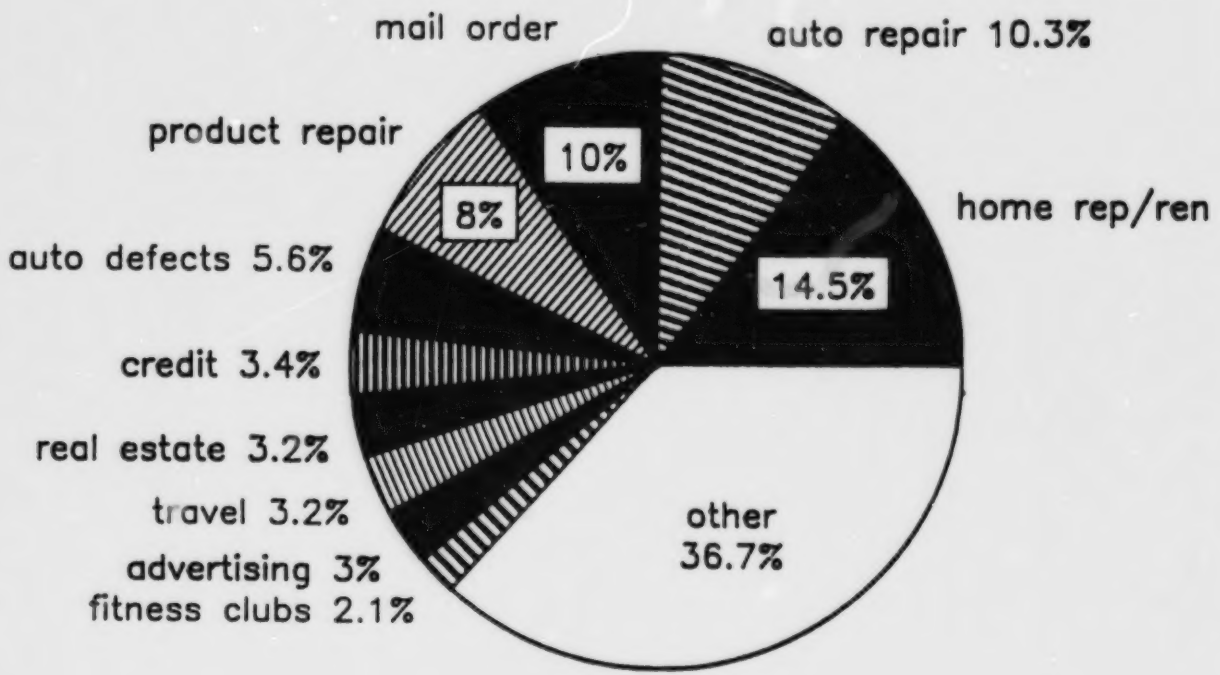
- The Ministry of Consumer and Commercial Relations, or any consumer organization, would be authorized to launch or defend civil actions on the behalf of any home improvement

consumer for violation of this Act. (This provision would enable Ministry officials and consumer organizations to intervene in cases where, while shoddy work is being consistently performed by a particular seller, there are insufficient grounds to launch a criminal action for violation of the Act.)

APPENDIX A

Top Ten Sources of Complaints

Ministry of Consumer and Commercial Relations, 1986

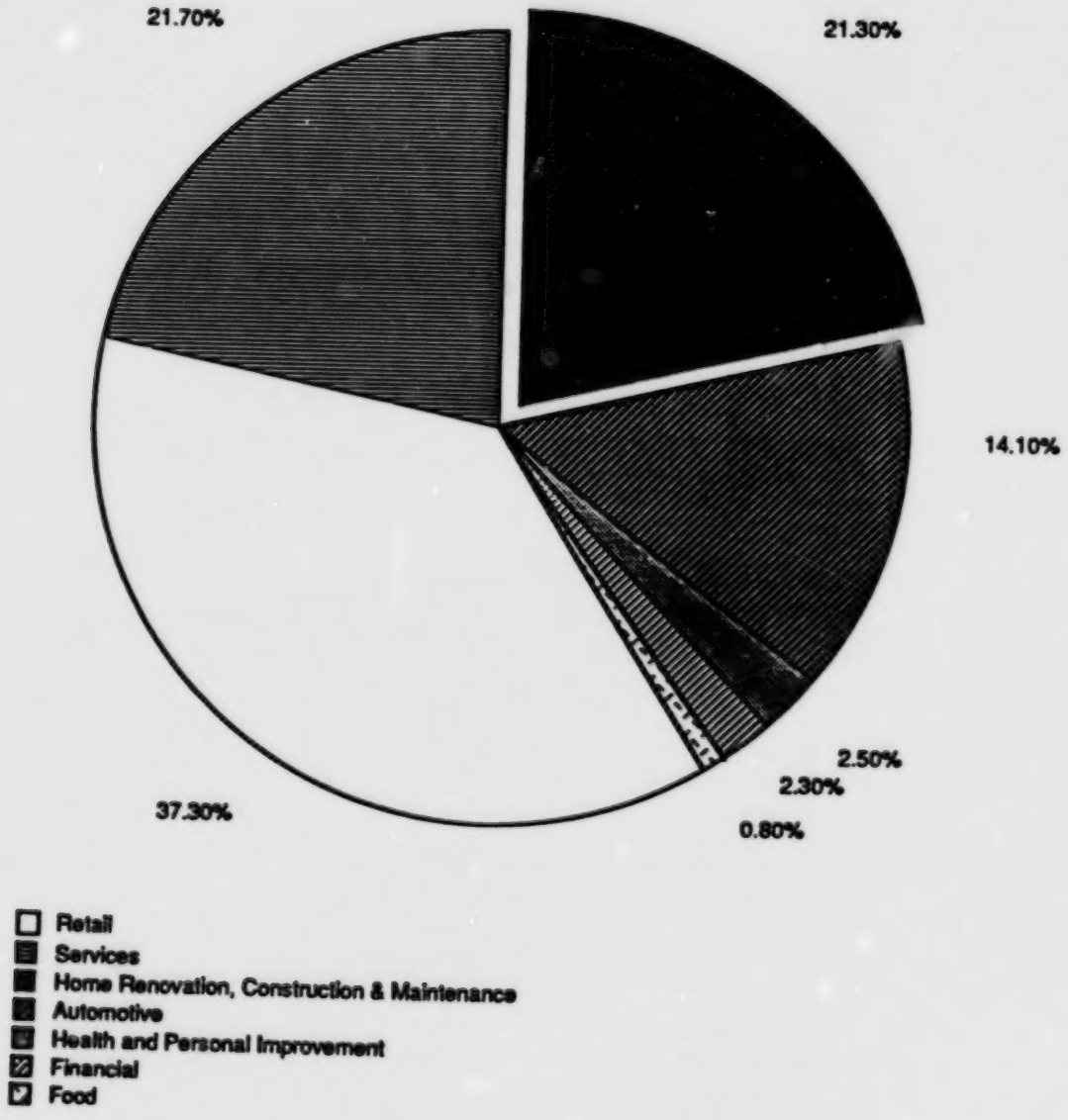


Source: Legislative Review Project, Review of Consumer Files, 1987

APPENDIX B

BETTER BUSINESS BUREAU

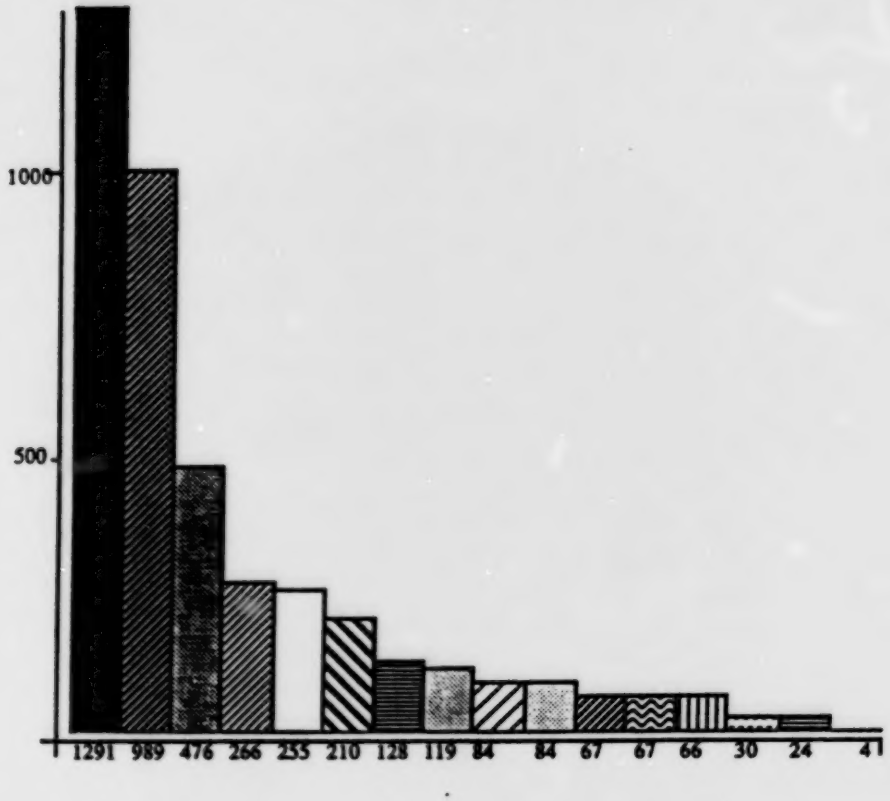
Sources of Complaints, 1985



Source: Canadian Council of Better Business Bureaus, Statistical Summary of Better Business Bureau Activity in Canada, 1985

BETTER BUSINESS BUREAU

Home Renovation, Construction and Maintenance: Breakdown of Complaints, 1985



Source: Canadian Council of Better Business Bureaus,
Statistical Summary of Better Business Bureau Activity in Canada, 1985

36. Automobiles

AUTOMOBILES

BACKGROUND

The Motor Vehicle Dealers Act requires the registration of all motor vehicle dealers and salespeople in the province of Ontario. Registration is dependent on an acceptable financial position and record of past conduct.

The regulations passed under the act require the disclosure of the previous use of certain vehicles for sale (e.g. taxicab or police cruiser), the disclosure of the particulars of sale of all new and used vehicles and the creation of an industry-sponsored compensation fund to protect consumers who suffer prepayment losses as a result of non-delivery of vehicles. Certain minimum terms and conditions are also provided for sales contracts, and it is required that registrants keep accurate records.

In 1984, the Ministry began to develop measures to provide a series of new initiatives designed to provide broader protection for the consumer in the purchase and repair of both new and used cars.

These initiatives were:

- Warranty protection on new cars through the use of an arbitration program;
- A compensation fund for consumers who have lost their cars or deposits when automobile dealerships enter into receivership;
- Car repair disclosure legislation to protect consumers from unscrupulous car repair outlets.

Two of these initiatives, the Ontario Motor Vehicle Arbitration Program (OMVAP) and the Motor Vehicle Compensation Fund have been in effect for just over a year. The Motor Vehicle Repair Act, dealing with the third initiative, received first reading in the Legislature on November 16, 1987, and was later reintroduced.

INFORMATION-GATHERING PROCESS

The size, importance and complexity of the automobile industry, as well as the diversity of issues which arise at any point along the chain of purchase (warranty-coverage, repair, maintenance and eventual resale) led to the identification of a wide range of issues and elements. These were determined both by the review's own research and during the consultative process.

The Ministry's current legislation on automobiles is confined to The Motor Vehicle Dealers Act. On the other hand, the specific objectives of this review of the motor vehicle area were much broader, and included:

- Examination of all the specific areas of concern, in order to provide a general understanding of the depth and breadth of the issues requiring action;

- Proposal of new or additional options for the Ministry to add to its consumer protection initiatives for both new and used car owners in the purchase and repair of their automobiles;

- Recognition of the impact on the consumer of certain growing trends, including automobile leasing and the sale of recreational vehicles, and consideration of whether new legislation is necessary to address those trends;

- Review of the regulations and standards for registration of motor vehicle dealers and salespeople under the act.

Extensive research and consultation included:

- Briefs from:
  - the Ontario Automobile Dealer Association;
  - the Toronto Automobile Dealers Association;
  - the Used Car Dealers Association;
  - the Canadian Automotive Leasing Association.

- Meetings with:
  - the Auctioneers Association of Ontario;
  - the Automobile Protection Association;
  - the Automotive Aftermarket Retailers of Ontario;
  - the Canadian Automobile Association;
  - the Canadian Automobile Manufacturers Association;
  - the Canadian Automotive Leasing Association;
  - the Canadian Importers Association (Automotive Imports Division);
  - the National Association of Fleet Administrators;
  - the Ontario Motorcycle Dealers Association;
  - the Ontario Recreational Vehicle Dealers Association;
  - the Peterborough Automobile Dealers Association;
  - the Toronto Car Auction;
  - individual car salespeople and other individuals representing automobile auctions.

- Relevant material from:
  - the Consumers' Association of Canada;
  - the United Senior Citizens of Ontario;
  - the Ministry of Community and Social Services.

- Interviews with Ministry personnel:
  - the registrar of motor vehicle dealers;
  - investigative, legal and consumer services staff.

- Research material:
  - the Consumer Opinion Survey conducted by the project;
  - statistics provided by the Ontario Automobile Dealer Association,
  - information from the Ministry's Consumer Services Bureaus;
  - Hansard;
  - Minister's letters and consumer complaint files;
  - legal journals;
  - newspaper clippings;
  - various reports and papers such as a consumer automobile leasing study conducted by the Consumer Council of Maryland, and a paper on consumer product warranties from the University of Western Ontario.

- Legislation from other jurisdictions, both Canadian and foreign, particularly U.S. "lemon laws" and their enhancements. Previous draft policy submissions on automobile issues were also reviewed.

GENERAL PROBLEM AREAS

Areas reviewed can be divided into three general fields of concern: entry into the marketplace, information disclosure and post-transaction protection. The issue of leasing vehicles was also examined as a growing market segment warranting serious attention. These three broad categories apply to both new and used vehicles, as well as to leasing transactions.

Entry into the marketplace concerns the standards which should be in place and met by all those doing business in the regulated industry. It requires recognition of both general requirements applicable to many industries regarding integrity and trustworthiness, and the specific requirements applicable to this industry, including educational standards. An important consideration in this area is the great variation that exists within the broadly defined motor vehicle industry.

Information disclosure covers advertising, as well as documentation relating to transactions. It is a prime area for possible preventive action to ensure that buyers are aware of all the relevant information regarding their purchase and are, therefore, less likely to be dissatisfied with it.

Post-transaction protection covers the extensive areas of warranties, repairs and complaint resolution. It is in this area that problems are most visible.

SPECIFIC ISSUES

The review team's efforts identified the following issues as needing to be addressed:

1) Education

There is general trend to establishing educational criteria for registrants in many regulated industries. This provides a minimum assurance of competence to the consumer, and helps reduce problems that result from negligence or simple lack of awareness, as opposed to purposeful unfair practices.

In the automotive field, there are many areas with which a registrant should be familiar, in order to best serve the customer.

Advertising standards, proper accounting practices, warranties, contract terms and conditions, dealer/ manufacturer-sponsored financial arrangements, the rights and responsibilities of consumers, salespeople and dealers and the general industry structure are some examples of areas that could be covered in a qualifying course. Such a course need not be lengthy or costly, to avoid creating an undue barrier to entry into the field. Recognition would have to be granted to the different branches of the motor vehicle industry that are controlled under the Motor Vehicle Dealers Act. Different standards may have to be created to recognize the different products and services being offered in the industry.

2) Unregistered Dealers and Unreported Transactions

It is not the intent of the act to control every motor vehicle transaction to the same degree. The private resale of personal vehicles by consumers was not what the act attempted to govern. However, in exempting persons not in the business of selling vehicles, a loophole is created that allows unfair practices to occur. Unregistered dealers do not meet the same standards that a registered dealer must, and customers of unregistered dealers are more likely to experience problems. "Curbside" sales offer the consumer little protection.

Court rulings have established that a person may sell up to 10 vehicles a year without being in the "business" of selling vehicles and thus having to be registered. It would remove some vulnerability for consumers, without harming the private resale of personal vehicles, if the limit for unregistered sellers was lowered. In other jurisdictions, a limit of three to five sales a year is applied.

Similarly, there is a problem with individuals who, although registered, do not deal from a fixed place of business. They are registered in order to attend automobile auctions and obtain used cars, which they then sell "curbside". Some evidence as to the existence of a place of business would not be an unreasonable registration requirement.

3) Categories of Registrants

Under the heading of motor vehicle dealers are people selling automobiles, both new and used, as well as motorcycles and

recreational vehicles. However, the act focuses on the automobile industry and therefore, requires these other sellers to comply with standards primarily geared to automobile dealers.

Categories of occupations which could be registered include automobile dealers, automobile wholesalers, motorcycle dealers, automobile leasing dealers and automobile auctioneers. There are special considerations in each of these areas. For example: in the motorcycle and recreational vehicle businesses, sales are highly seasonal and many salespeople are summer students who do not work for the 12 months to which the registration process is geared. Should both dealers and salespeople be registered, or only the dealers? Likewise, should warranty protection on motorcycles be defined in the same terms as that on automobiles, or should unique directions be developed?

The leasing industry is growing rapidly in Ontario. Some such companies are associated with registered dealerships but many are not. The latter companies are strictly in the business of leasing vehicles; however, sometimes they sell former lease-vehicles, often to those who have been leasing them. These companies are registered under the act; but should they be categorized with companies whose prime intent is the sale of vehicles, or should there be a separate category for motor vehicle leasers, with accompanying provisions?

A question has been raised, as well, as to whether salespeople should continue to be registered, or if dealership registration is sufficient. Salespeople are the "first-line" of consumer interaction. If educational requirements are to be placed upon them, it would be inconsistent to then remove the registration requirement. Currently, salespeople are defined as being "appointed or authorized" by a dealer. A better definition, more accurately reflecting the relationship, may simply be to say they are "employees".

4) <u>Technical Deficiencies under the Motor Vehicle Dealers Act</u>

Currently, notice of change of certain information must be provided by a registrant within five days. This time frame is not always workable and could be increased. On a related matter, it might be better if the dealer and not the salesperson was responsible for providing information concerning the status of salespeople, including their commencement and termination of employment.

In addition, it would be useful if the registrar could determine who the controlling shareholders and managers of a corporate applicant were, to avoid the prospect of undesirable registrants hiding behind corporate screens.

Given the above, and considering the volume of registrants in this field, it might be sensible for the Ministry to develop an industry-specific registration form, as opposed to the

multiple-industry forms currently used.

5) Advertising

Currently, the registrar's power over the motor vehicle advertising field is relevant to individual dealer advertising. The act grants no authority per se over advertising of motor vehicles. To have some control over the advertising practices of motor vehicle dealer associations, the registrar must register them. It would be simpler, and more encompassing, if the registrar's power to review advertising was applied on a broader scale, to all advertising which addresses motor vehicle sales.

Another problem is that it is possible for the combined advertising of new and used vehicles to mislead consumers.

Another is that, registrants are currently prohibited from publishing the fact that they are registered. This is to avoid giving the impression that registration is more than it is. It might be useful to inform consumers of this fact, so long as it was not misinterpreted as a "seal of approval". Educating consumers about the existence of a registration system might help in the control of unregistered dealers.

6) Information Disclosure and Accuracy

An extremely important element of information disclosure relates to the previous uses of used cars. Presently, there are certain uses (e.g. as a police cruiser) that must be disclosed. An examination of the field can yield a number of uses beyond those currently covered, which could be a material fact for a potential buyer to consider in the purchase of the vehicle.

A classic fraud in the sale of used cars is odometer tampering. The Motor Vehicle Dealers Act prohibits this, but the prohibition refers only to registered motor vehicle dealers. Instead, it should include any person who exchanges or repairs an odometer. Such tampering falls under the Business Practices Act and Criminal Code, but the Motor Vehicle Dealers Act has its own penalties that would be applied to such people.

The vehicle transfer permit which is completed to conclude the sale of a motor vehicle has certain disclosure requirements. These could be enhanced to ensure that all vehicle transactions, not just dealer-to-consumer, have information on previous use and material facts recorded at the time of sale. Such information would be deemed to be contractual in nature between the vendor and purchaser. Such suggested direction has precedents. In Quebec, dealers are required to place a standard disclosure label on the windows of used cars to assist the consumer.

7) Post-Transaction Protection

Quebec is considering limiting third-party warranties (i.e. those offered by insurance companies, or others not party to the actual sale) on older used cars. Problems with such vehicles are often attributable to ordinary "wear and tear", as opposed to manufacturer defects, and are not covered by such warranties. They are, therefore, of less relative value than a conventional warranty, which deals primarily with manufacturer's defects detected during the earlier part of a vehicle's life. The considerable problems of insolvency on the part of the warranting party and the subsequent loss of funds are also concerns.

Consumer groups have said that manufacturer "service bulletins" to dealerships, identifying problem areas with a vehicle, constitute a "hidden warranty". They see it as a discretionary warranty on the part of the manufacturer/ dealer, which is exercised only if the consumer complains ardently enough. It would be helpful if such bulletins were voluntarily posted for examination by consmers.

The Ontario Motor Vehicle Arbitration Program was found by the review Team to be an optimal solution to disputes and problems with new car purchases. It would be useful to extend it and provide a "used-car" OMVAP to deal with this side of the motor vehicle industry. The lack of such a program is a discrepancy between the two areas at the moment.

8) Leasing Industry

The leasing industry is expected to undergo considerable growth in the near future. These leases are multi-year contracts with potentially complex features and variations in early termination penalties, options to buy, responsibilities for the vehicle and so on. Minimum contractual terms have been proposed by the Canadian Automotive Leasing Association, to provide some basis of uniformity for consumers in making comparisons and decisions. Such minimum disclosure is required on the sale of vehicles; - the coverage of leasing is a logical extension.

Minimum advertising standards have been examined in relation to the leasing industry, to ensure that prospective customers are given all the necessary and comparative information needed to make informed decisions.

PROPOSED DIRECTIONS

After analysis of these issues and various means of approaching them, the review team arrived at proposals in these key areas: Registration, Disclosure, Leasing, Advertising, and Post-Transaction Protection.

Registration

a) Generic registration requirements would be outlined in the proposed Consumer Protection Code;

b) Mandatory education requirements: A mandatory program is proposed for motor vehicle dealers and salespeople, of two to three weeks duration, set up in cooperation among the Ministry of Colleges and Universities, The registrar of motor vehicle dealers, and the industry associations (eg. the Ontario Auto Dealer Association and the Used Car Dealers Association). These requirements would have to be met by all new applicants to the industry and any salespeople wishing to become dealers;

c) "Curbsiders": It is proposed that there be an improved definition of "motor vehicle dealer" in the act, and that the maximum number of motor vehicle sales by unregistered sellers be reduced to five in each calendar year;

d) Business premises: The registrar should be satisfied, through photographs of the intended premises, a copy of zoning bylaw, and survey plans, that suitable business premises exist;

e) Categories of registrants: Categories should cover the occupations of automobile dealer, automobile wholesaler, motorcycle dealer, automobile leasing dealer, and automobile auctioneers.

i) Auctioneers and wholesalers selling to registered motor vehicle dealers should continue to be exempt from registration. Those selling to consumers should be registered, except in the case of the auction of motor vehicles as incidental parts of an estate;

ii) Motorcycle dealers (not salespeople) should be registered, but warranty protection should not meet the same guidelines as automobile dealers, and consignment sales should be permitted;

iii) Motor vehicle leasing dealers should be registered in a separate category;

iv) Recreational motor vehicle dealers should be exempt from registration. They can be viewed as direct sellers and subject to control under other legislation;

v) Automobile associations should not have to be registered in order to advertise (motor vehicle advertising per se will fall under the registrar's jurisdiction);

vi) Automobile salespeople should continue to be registered and defined as employees of a motor vehicle

dealer, removing the use of the words "appointed or authorized".

f) The registrar should be able to challenge a corporate motor vehicle applicant to obtain information about those other than officer/directors; for instance, about the controlling shareholder, the manager of operations etc.

g) The time requirement for notice of change to the registrar should be increased from five to ten days;

h) Motor vehicle dealers, not salespeople, should be responsible for providing information concerning the status of a salesperson. Also, the Ministry should provide a wallet-sized registration document to salespeople at the time of registration;

i) Industry-specific registration forms for motor vehicle dealers and salespeople should be developed.

Disclosure

a) Previous use should be disclosed in the following categories: taxi cabs, police vehicles, emergency vehicles, organized racing vehicles, ambulances, driver's school automobiles, use as a lease or rental vehicle, use as a demonstrator or executive motor vehicle, if the vehicle has ever been classified as a salvage/rebuilt unit and if the vehicle has been used for delivery purposes. Also disclosed should be every business or public agency that owned the vehicle or rented it on a long-term basis. Disclosure should be made if damages have occurred requiring repairs costing more than 20% of the asking price of a new vehicle, or if there have been damages costing more than $2,000 in the case of a used vehicle. It should be disclosed if the vehicle has been brought into this province within the past 12 months specifically for the purpose of sale. Any repair work done on the vehicle while in the possession of the dealer should be disclosed. Consideration should be given to requiring the name and address of the last owner of the vehicle to disclosed. It should be disclosed that the odometer records the true distance travelled by the vehicle and, if not, what that distance is. Disclosure should be made as to whether any encumbrances exist against the motor vehicle;

b) Dealer label disclosure: A standard disclosure label should be affixed to the window of used cars. The information presented should cover previous use and material facts, such as make, model andyear, as well as the odometer reading;

c) Vehicle transfer permits: The information requirements on these permits should be enhanced. Previous use and material fact compliance should be covered, and thus become contractual between vendor and purchaser;

d) Odometer: Section 19 of the regulations to the act should

be expanded to cover any person who exchanges or repairs an odometer, not just a registered motor vehicle dealer;

e) The prohibition against publishing the fact that a dealer is registered should be repealed, and publication should be encouraged as part of an overall Ministry public education program.

Leasing

a) Minimum contract terms: They should include the name and address of lessor and lessee, term of the lease, the make, model, year, serial number and body type of the motor vehicle, the start and end dates of the lease, distance driven restrictions, insurance requirements (type and amount, carrier, lessee's broker or agent, policy number, coverage, and responsibilities of lessee with respect to providing lessor with a policy renewal certificate, notice of cancellation and responsibilities with respect to an accident), injection or pay-down amount required, security deposit amount, method of payment (when, where and how), and permitted operators (in addition to lessee). A provision should also be included whereby the lessor and lessee agree to honour the terms and conditions of the lease, a statement should be made that the lessee is responsible for the vehicle's repair and maintenance, and a statement should be included that title in and to the vehicle shall remain with the lessor in the event of default or early termination. Finally, there should be a statement indicating where and when the vehicle is to be returned at the end of the lease;

b) The lessee's rights should be clarified, establishing the chain of responsibility from manufacturer to distributor, dealer to lessor and then to lessee. This linkage should be established for all warranties, including the manufacturer's express warranty, implied warranty, service contracts and other pertinent rights.

Advertising

a) The advertising of new and used motor vehicles should be separated in any advertisement in order not to mislead the consumer;

b) The registrar should have the absolute right to review all motor vehicle advertising that in any way addresses a business transaction between a business and a consumer;

c) Lease advertising should have the following minimum criteria: vehicle description including make, model, year and any optional equipment included in the vehicle offered for lease, the term of lease, the monthly lease payment inclusive of provincial sales tax, options at the end of a lease, the type and amount of deposit, the kilometer limit before additional charges are incurred, and a premature termination charge if applicable;

d) Understandable language, legible-size type and standard format should be established in lease contracts.

Post-Transaction Protection

a) Extended third-party warranties on used cars should be prohibited;

b) The Ontario Motor Vehicle Arbitration Program should be continued and extended to include all used cars;

c) A cooling-off period in the purchase or lease of an automobile should be granted. In the case of purchase, this would only apply where the consumer had not taken possession;

d) Manufacturers should be encouraged to implement public "service bulletins", with the result that consumers would be able to examine the bulletins relevant to the type of vehicle being sold at a dealership;

e) A limitation should be established on early termination fees to ensure they do not greatly exceed the lessor's cost or damages. Disclosure of such penalties should be separately and prominently shown on the contract;

f) In lease arrangements, security deposits should be placed in trust and interest paid to the lessees. Otherwise, there should be a clear statement that no interest will be paid;

g) In a leasing arrangement where the lessee subsequently purchases the car, warranty protection should not be extended.

37. Travel

TRAVEL

BACKGROUND

The Travel Industry Act requires that all travel agents and wholesalers in Ontario be registered, and in so doing, meet certain financial standards and background requirements. As well, registration requires participation in a compensation fund, which reimburses deposits to clients if registrants go out of business. The legislation imposes specific requirements on record-keeping and financial reporting, as well as the business experience of those overseeing travel offices.

At the time this review was conducted, a government bill to amend the Travel Industry Act was before the Ontario legislature; it has since passed third reading and received royal assent on January 7, 1988, after the review team had completed its discussion papers. The review team viewed this bill as a part of the act, realizing it answered some specific needs in the act. It was the intent of the review team to respond not only to the current act as passed in 1974, but to anticipate other developing trends and needs.

The review team found the Travel Industry Act to be what has often termed a "model act"; however, due to inherent changes in the marketplace, in the nature of travel services and the demand for travel services, the act was ready to be reviewed to keep it progressive and current. Current problems experienced by consumers of travel services fall into two categories: financial problems and those of quality, meaning loss of money and loss of enjoyment. The act's original purpose was primarily to address the danger to consumer money, which it has done at minimal cost and with great success through a compensation fund and ongoing financial monitoring of registrants. However, the category of quality complaints had not been effectively addressed.

The travel industry's three associations all desire more active involvement in the regulatory process. They appear sincere in speaking to the need to improve standards in the industry and an ambition for eventual self-regulation. Although the latter was not considered a viable option at present, ways were examined to involve the industry to the benefit of both it and the travelling public. This was supported by a realization of the complexity and scope of the area being approached and the difficulty of effectively dealing with it without industry cooperation, as well as the potential benefits of calling on the experience of reliable industry members.

INFORMATION-GATHERING PROCESS

As part of an information-gathering and consultative process, the project reviewed:

- formal submissions made by the Industry associations, namely:
  - The Alliance of Canadian Travel Associations;
  - The Canadian Association of Tour Operators;
  - The Canadian Institute of Travel Counsellors;
- Ministry correspondence regarding travel, including Minister's letters, inquiries, and letters from individuals commenting on travel legislation;
- consumer opinion research from Ministry opinion surveys in 1978, 1980, and 1983, plus the opinion survey conducted by the Legislative Review Project in the Spring of 1987;
- relevant decisions of the Commercial Registration Appeal Tribunal (CRAT);
- newspaper clippings regarding Travel issues;
- industry trade papers;
- brochures, contract forms, and advertising material from both retailers and wholesalers;
- other provincial legislation in Canada;
- legislation in the United States, Europe, Australia and the Far East;
- relevant case law.

In addition, the review team:

- conducted interviews with relevant Ministry personnel, including:
  - registrars (current and past);
  - deputy registrar;
  - investigators;
  - divisional legal counsel;
  - consumer services officers;
- held individual meetings with each of the industry groups;
- held two day-long travel expert panel sessions (with representatives from the board of trustees of the travel industry compensation fund, Consumers' Association of Canada, the Alliance of Canadian Travel Associations (Ontario), the Canadian Association of Tour Operators, the Canadian Institute of Travel Counsellors and Ministry of Consumer and Commercial Relations management) to discuss industry submissions and general travel issues;

Consumer and Commercial Relations management) to discuss industry submissions and general travel issues;

- o conducted field trips to retail and wholesale companies and met with other people both in and outside the travel industry to discuss major issues and concerns;

- o held ongoing discussions with the registrar, deputy registrar, legal counsel, and the director of the Business Regulation Branch;

- o consulted with the registrars of both the Quebec and British Columbia Travel Acts.

GENERAL PROBLEM AREAS

The purpose of the review of the Travel Industry Act was to identify and examine issues in this regulated industry that arise out of the nature of the industry itself, as well as those related to the existing regulatory structure. A key objective was to deal fairly with these issues for both the consumer and industry.

The review team examined the existing system to ensure financial protection, and identified possible new steps that could be taken to deal with the area of quality.

Quality

The travel industry has undergone rapid growth in the past decade. As the demand increases for new, exotic and moderately priced travel services, particularly to Caribbean and other "sun" destinations, problems with consumer satisfaction over the quality of the travel experience have increased. When market forces encourage tour operators to experiment with new destinations, consumers may find themselves in new untested facilities, in countries with lower standards of living and a poorer economy.

The quality area cannot deal with substandard travel services, without considering the broader relationship between expectations and reality. This relationship plays a vital role in determining the consumer's holiday enjoyment and appreciation of fair value. Overall, the consumer's expectations are formed through advertisements, brochures and the representations made by travel sales professionals. The review focused in all of these areas on the assumption that, if consumers are well-informed when selecting a travel destination, they have a far greater chance of satisfaction.

The assurance of quality in the provision of travel services is difficult to achieve. Moreover, it is extremely difficult to obtain through purely legislative measures. The most practical course would be to propose changes to ensure that the consumer is provided with fair and accurate information at

the very start of the transaction, and to establish measures of redress in the event of an unsatisfactory outcome.

The issue of general advertising is not new. The office of the registrar responsible for administering the Travel Industry Act has attempted, over the years, to deal with advertising but found the present act a less than satisfactory vehicle to control unfair practices in this area.

Financial Protection

In contrast to the issues related to quality of service, those concerning financial protection dealt primarily with aspects of the existing legislation. Financial protection under the act has three main components: the Travel Industry Compensation Fund; criteria for registration; and financial reporting requirements. Examination of the operation of each of these components had led to the identification of areas which could benefit from improvement and innovation. Enhancement was sought in three forms: improved protections offered the consumer; increasing the system's efficiency from an administrative standpoint; and reducing legislatively-induced uncertainty or other undesirable impositions on the travel industry.

A financially stable industry was recognized as the surest protection for consumers, both financially and in other respects. However, it was felt that the means used to encourage and improve financial stability must be balanced with the degree of intervention necessary in business operations.

SPECIFIC ISSUES

1) Financial Protection

a) Validity of compensation fund parameters

The fund will currently compensate consumers who have paid a registrant for a travel service, and then failed to receive either the service, a refund or alternate arrangements when they are legally entitled to such. The fund does not cover problems over the quality of service. Compensation is subject to a limit of $3,500 per traveller, and $1.5 million for claims arising from the failure of any one registrant.

Currently, the fund is set with a maximum value of $3 million; at that point, regular contributions cease. There is also a trigger level, of $2 million, below which additional contributions can be required from registrants. These extra contributions are in the form of a special assessment. If the payments which the fund is liable to make are increased, it is necessary to consider the level of the fund required to support this increased liability.

The monetary limits and terms of the Travel Industry Compensation Fund were last updated in 1983. Since that time, there has been growth in the industry and overall economy, which brings into question the validity of the current parameters. Limits are necessary to ensure the fiscal stability of the fund; however as time passes, they are in danger of becoming outdated. It is not viable to eliminate them, due to the aforementioned concern with fiscal stability; it is generally agreed that they need to be raised.

b) Contribution rates to compensation fund

The Travel Industry Compensation Fund is supported through regular contributions from the two categories of registrants (travel agents and travel wholesalers) proportionate to their gross sales, and an initial contribution from new registrants. The rate for travel agents is $3 of contributions per $10,000 of gross sales; for travel wholesalers it is $12 per $10,000 of gross sales. A new registrant makes an immediate contribution of $2,000. In the case of a new branch office registration, the amount is $1,000.

Over the history of the fund's operation, the collapses of travel wholesalers have been responsible for the most of the money paid out of the fund (72.5%) but their contributions have accounted for a smaller proportion of the fund's income (57%). Despite a lower nominal contribution rate, the agent community generates more total revenue for the fund, due to the fact that its collective gross sales are substantially greater then the wholesale community's. However, the structure of the travel industry and the distribution of risk means that the collapses of wholesalers cause the biggest draws on the fund.

As with the other parameters of the fund, the contribution rates were last set in 1983. The absolute amounts required from new registrants are therefore diminished in value by several years' inflation. The ongoing contributions, as ratios, are not influenced by inflation. However, alterations may need to be made if the responsibility for supporting the fund is to be distributed in accordance with claims against it.

c) Financial requirements and reporting

The current act gives no precise criteria for the financial situation a registrant must maintain. Similarly, the act is not explicit in terms of the kind of financial reports registrants are to make to the registrar's office.

The maintenance of financial standards, and thus the reporting system to monitor them, are important in order to avoid the considerable inconvenience and potential loss to consumers that can result from an insolvency in the travel industry. The coverage of the compensation fund is subject to limits, and a payment from the fund does not replace lost vacation

time. Thus, although consumers are protected to some degree, the goal must be to avoid collapses by monitoring the industry and taking corrective steps when a company is in trouble. Obviously, government intervention involves a delicate balance between protecting consumers, and leaving companies free to make business decisions.

Travel industry association members have suggested that a positive working capital balance be required within the regulations, and that a more rigorous reporting system be developed. The priority of reliable travel businesses is to see the financial system work efficiently. It is surviving industry members, through contributions to the compensation fund, who pay for any collapses. The working capital requirement would not be precedent-setting: Quebec and British Columbia have similar conditions in their travel legislation at present.

The second half of an improved system would be contained in the reporting system. The most rigorous requirement considered is the provision of an audited financial statement. However, this is an expense that may not be warranted in all cases. One direction is to set a level of gross sales beyond which a registrant must provide an audited statement, allowing those below that line to provide a "reviewed statement". The latter is a less authoritative document, but an improvement over many of the financial statements currently being submitted.

2) Quality and Standards

a) Professional requirements

Recently the Ontario government passed a bill which will remove the unproclaimed and thus unenforced registration requirements for travel salesmen. There is a concern in the Ministry, the industry and elsewhere that, although it is undesirable to register these employees, a definition of a "travel consultant" should be in the act, to set out responsibilities. Such a definition would also assist in outlining the consistent requirements for travel consultants.

Objective criteria have been examined to deal with the desirable standard of professionalism registrants should meet when entering and operating in the travel industry. Currently, the standards of registration are not precise and have had to be interpreted by the registrar's office in order to be applied. The industry supports stronger and more explicit entrance requirements, without unduly limiting entry into the field.

b) Advertising and brochures

Section 15 of the act, dealing with false and misleading advertising, has been found ineffective in dealing with several undesirable practices. A set of advertising

guidelines was issued by the former registrar, with the cooperation of industry associations, but it was found to be unenforceable due to a lack of explicit legislative support. The act provided that advertising could be dealt with in its regulations, but the necessary regulations were never drafted.

There are several ways that promotional material can mislead the consumer, or fail to adequately inform. Several of these problems concern attempts to create an overly favourable "first impression" of the travel service/package being offered. Particular examples include: the use of bold, catchy statements which are then limited by conditions in fine print effectively negating the offer; and, in general, statements being made for which the responsibility of fulfillment is subsequently denied. Prices may be quoted in a deceptive manner. The advertisement may quote "previous example" prices of questionable validity since travel prices are heavily influenced by seasonal factors, and the product may not have been commonly sold at the example price quoted. In other cases, specials are advertised that turn out to be available only for two travellers, although the offer at first appears to be for one person.

This remains a key area for improved consumer protection; only informed consumers are in the best position to protect themselves. The methods by which the travel services are promoted may be divided into flight advertisements, tour advertisements and brochures/flyers. Each of these would ideally require its own set of criteria, although there are common factors such as air flight information.

c) Contractual terms

In some areas of the review team's work, the concept of standard or minimum terms and conditions to be included in contracts has been raised. It has been considered in this review of the travel industry as well.

The information presented in wholesalers' brochures at present is often similar across companies, but is presented in different ways, making it difficult for consumers to compare. A standard, and prominently displayed set of terms would allow easier comparison by the consumer. A further step would be to require the use of standardized contracts, although this would, by limiting the variance in contracts, reduce the choices available to the consumer. A standard format would allow comparison without limiting competition.

The receipt now required by the regulations (s.18) contains some, but not all, of the information relevant to the consumer's purchase. It is proposed that it be expanded to include a full description of the services, and include either the contract terms and conditions or a reference to the appropriate brochure, to more clearly inform the consumer and provide a written record. This approach is similar to requirements in place in Quebec.

d) Allocation of responsibility

A current problem is that, because of the different participants in the travel transaction, the responsibility for various elements of the service may be lost. This may occur either before or after the service is rendered, and can occur when the consumer has a complaint for which no one will accept responsibility.

A clear division of responsibility among agents, operators and customers would avoid both confusion and the avoidance of responsibility, and would assist consumers in knowing when they have a valid complaint and with whom.

A further step is to hold the operator whose name is used in a tour advertisement responsible for fulfilling the promises it contains.

In hand with delineating the responsibilities of the travel agent and wholesaler is the need to outline the traveller's responsibility.

e) Complaint resolution

Possibilities regarding complaint resolution included an independent arbitration board, whose judgement would be binding on the consumer and the travel business. Such a board could be limited to hearing complaints dealing with sums of money up to a set limit, or excluding injuries and illnesses, leaving those to traditional courts.

Related to this is the concept of an industry council to assist and complement the registrar's function. All registrants would belong to such a council, providing a universality not found in existing industry associations. In addition to assisting in an arbitration process, a council's duties could include monitoring advertisements, preparing educational material in cooperation with the industry associations, reviewing standard terms and conditions to ensure that they meet regulation requirements, compiling industry-wide codes of ethics and standards of performance (legislated through regulations to apply to all registrants), preparing a glossary of terms, approving educational programs for travel counsellors, and tracking future trends in the industry.

A council of this sort could be comprised of a cross-section of interests from the industry and public, including consumer advocacy groups.

f) Offences and penalties

Another area examined was the registrar's capability and options to take action against registrants who do not comply with the act or regulations, and award necessary penalties. Without the registrar's ability to act against offenders and

Without the registrar's ability to act against offenders and obtain appropriate results, it is of little value to put offences in the act. Actions appropriate to the offence should be available; further detail is provided in the Proposed Directions which follow.

PROPOSED DIRECTION - GENERAL

A number of possible courses of action were considered by the review team and discussed with Ministry personnel and interested parties. In general, these actions focused on tightening the system of financial protection, and dealing with quality complaints through both disclosure requirements and an improved complaint resolution process.

The proposed direction is to improve each of the three elements of financial protection: the financial standards for registrants, the reporting system to monitor compliance, and the compensation system to provide restitution to the consumer. Important in this area is the proposed "consumer lien" on prepayments and deposits for goods and services. This would apply to prepayments for travel services, giving the consumer a priority claim on the bank accounts of a failed company.

The quality issues are addressed by proposing advertising standards; standards intended to provide the consumer with relevant information upon which to base choices and a clear understanding of responsibility. Additionally, it is proposed to strengthen professional requirements to enter and function in the travel industry, in order to protect the consumer from inadequate service and the industry from on-going failures. Further proposed steps are to broaden the range of penalties, making them more progressive, and to make available an arbitration process to act as an alternative to the courts in resolving the more difficult and protracted complaints.

It is also proposed that an industry council be established, in order to encourage the involvement of a range of industry and other groups, in an ongoing and permanent vehicle.

PROPOSED DIRECTION - SPECIFIC

The following are the specific directions proposed by the Travel Review Team of the Legislative Review Project. Due to the interrelation between financial and quality issues, specific proposals are not arranged according to those two categories, but rather by their subject matter.

1) Professional Qualifications

- It is proposed that the registration requirements under Section 27 of the regulations be strengthened and standardized, to emphasize specific educational and

employment requirements. These qualifications would have to have been obtained in the five years previous to application, and experience would have to be in the same area of business (agent/wholesale) as the licence which is being sought. Entrance requirements for agent and wholesaler registrants would match those proposed for the foundation statute, possibly including:

a) not having been convicted of an offence under the Travel Industry Act;

b) maintaining proper premises;

c) showing that he or she has carried on continuously and on a full-time basis, for a period of at least three years, activities as an agent or consultant for a licensed operator; or had two years' experience and one year in a recognized educational program; or been accredited as a certified travel counsellor "CTC" or "FCTC" as designated by the Canadian Institute of Travel Counsellors or equivalent;

d) employing, in the full-time capacity of "travel consultant", at the location for which the application is made, one or more persons who meet the following conditions:

- legally allowed to work in Canada;
- not convicted of a criminal offence in the past five years;
- not convicted of an offence against the Travel Industry Act;
- living in Ontario at the time of application and during the term of the licence;
- having carried on continuously, and on a full-time basis for at least three years, the activities of promoting travel services, or having two years experience and one year in a recognized educational program or be accredited as a certified travel counsellor "CTC" or "FCTC" as designated by the Canadian Institute of Travel Counsellors or equivalent, and abiding by the organization code of practice;

o A definition and specific responsibilities for a "travel consultant" should be created. The current act's definition of "Travel Salesman" may be adopted, without the registration requirement, holding the direct or indirect collection of money from the public to be the defining factor;

o It is proposed that all travel wholesalers also be required to register as travel agents, in recognition of the fact that although some firms may trade almost exclusively through agents, they still deal directly with consumers upon occasion.

2) Financial Requirements and Reporting

- Registrants should be required not to have an ongoing negative balance of working capital and/or net worth;

- The registrar should be allowed to set a line of gross sales, above which all registrants must provide audited statements. Below this an accountant's reviewed statement would suffice;

- It should be specified that the principals of a firm whose registration has been revoked or suspended are liable for any money received thereafter to carry out functions for which a registration is required.

3) Contractual Obligations

- It is proposed that the minimum requirements to be included in the terms and conditions of the contract be regulated.

  a) The advertiser should include in the brochure or any flyer in lieu of a brochure, the terms and conditions of the contract. Any supplementary promotional material would have to refer to the brochure or flyer in which such terms and conditions could be obtained;

  b) Standard terms and conditions should be developed and prominently displayed in all travel literature, with information under the following headings:

     - procedure for booking (deposit and final payment requirements, cancellation, refund and penalty provisions, policy for reimbursing deposit and service charges);

     - travel insurance coverage;

     - traveller, agent and operator responsibility.

  c) The only waiver of responsibility would be in regard to facilities and services which are not indicated in the brochure/flyer although they may be considered normal services to the Canadian traveller (such as electrical power, hot and cold water and environmental conditions);

- It is recommended that the provisions of Section 18 of the regulations be expanded to require that the receipt for payment include a full description of services, and either fully describe or make reference to the appropriate brochure which outlines the contract terms and conditions. The receipt would include:

  a) the consumer's name and address;

b) the date of payment, amount received and balance owing;

c) name, business address and telephone number of the agent;

d) name of the operator providing the travel service;

e) name of other relevant suppliers (e.g. carrier and type of equipment they are using, hotel);

f) destination, date and time of departure and duration of trip;

g) full description of services provided;

h) reference to the terms and conditions governing the trip, as identified in relevant brochure;

i) serial number of receipt;

j) insurance waiver form for clients to sign, indicating that insurance coverage has been offered and either purchased or refused;

- It is proposed that the regulations be amended to set out contractual obligations so that responsibility falls upon the operator whose name is used in connection with the tour advertisement. Agents acting under contract to promoters, as intermediaries, would not be responsible for the latter's advertising but would be responsible for their own contractual obligations;

- Consumer service warranties, as discussed earlier, should apply to travel services. This would require conformity with description/sample/demonstration, and acceptable quality of performance.

4) Allocation of Responsibility

- It is proposed that the regulations include an explicit allocation of responsibility among the participants in travel transactions. This would assist in preventing or resolving problems and complaints;

- The tour operator should be responsible for:

a) providing those travel services indicated in its brochure/flyer as being included in the selling price (with the exception of modifications that have taken place with appropriate notification to the consumer);

b) performing the tour in such a manner that it has the warranted qualities and is not affected by deficiencies which conceal or reduce its value as presumed under the contract;

c) notifying, without delay, the agents and clients as soon as alterations become necessary to the services contracted for, or to the price of the package tour;

d) not making material changes in the itinerary after the tour contract has been executed (final invoice paid). Material changes would include a 24-hour or more change in the scheduled departure time, a change in origin or destination city, a substitution of any hotel not listed and contracted for, a price increase over the contract price unless the operator could show that the increase was necessary for reasons beyond its control (i.e. currency or fuel surcharges, taxes);

e) making no additional changes for any circumstances whatsoever, except for reasons beyond the tour operator's control (i.e. political unrest or outbreak of disease), less than a minimum of 14 days before the date of the commencement of the tour;

f) terminating the contract in the event that the trip is jeopardized as a result of an unforeseeable event;

g) in the event of over-booking by the hotel management, if realized before the trip commences, the tour operator would be responsible for offering the choice of another holiday of at least the same standard or a prompt refund; if realized after the trip commenced, the operator would have to find alternate accommodation of equal value or pay compensation if the hotel facilities and location were of a lower standard;

h) advising the travel agent immediately of any material change that will affect the agent's client;

o The travel agent should be responsible for:

a) providing travellers with appropriate documentation at least 14 days prior to departure. If booking is made less than 21 days prior to departure, an airport pickup is acceptable;

b) advising the client without delay of any material change that will affect the client;

c) employing at least one travel consultant on a full-time basis;

d) providing full counselling service to the public or advertising that it is a booking service only;

o It is proposed that the traveller's remedies include claiming remedial action without penalty by terminating the contract; claiming a full or partial refund; accepting

alternate arrangements or damages for non-performance on the part of the tour operator if:

- the tour is affected by deficiencies which conceal or reduce its value as presumed under the contract;

- the trip is jeopardized as a result of an unforeseeable event;

- the operator makes a material change in the itinerary, without notifying the traveller (in the event that a tour has to be cancelled as a result of any material change made prior to commencement of the tour, the operator should be required to give the traveller the choice of either accepting the change, which must not lessen the standard of the holiday, an alternative tour of comparable standard, or a full refund; in the event of a significant change made after the commencement of the tour, the operator should ensure that the facilities subsequently offered are of equal or better standards, or a full refund, less reasonable expense, is made; in the event of a minor change made after the commencement of the tour, the operator should offer substitute facilities of an equal or better standard, or provide adequate refunds or reduction on the total price of the package);

- there are price increases as a result of acts of God;

o Further provisions, as follows, could make it an offence against the act if:

a) a tour operator failed to fulfill any portion of the contracted agreement whether the guarantee, promise or representation was by written or oral communication, advertisement or literature printed by or caused to be printed by the tour operator;

b) a registrant failed to make a prompt refund in the event of a failure to fulfill any promise, guarantee, or representation regarding the contracted travel services;

c) there was a substitution of hotels of "similar", "comparable" or "equal" quality, as the vagueness of these terms permits virtually unlimited substitutions.

5) Industry Standards

o The Ministry should support the adoption of voluntary standards, set in cooperation with industry associations, to encourage the adoption of industry-wide codes of ethics and standards of performance.

6) Minimum Advertising Standards

- All advertisements, brochures and flyers should give:

  a) place of departure and arrival (naming airports);

  b) frequency of departure and period of availability of flights at the advertised price; specific dates should be identified if the price is available on four or fewer departure dates;

  c) the name, phone and registration number of registrant.

- No advertisements, brochures and flyers should be allowed to:

  a) promote specials that restrict availability, such as 2 for 1, or fares unavailable to a single passenger, unless clear reference is made to terms of the offer;

  b) make statements which are grossly different from the truth, or which would mislead the public into believing the service is much better than what is actually provided;

  c) include clauses in fine or small print which negate the offer stated in bold copy;

  d) include clauses which restrict the responsibility of the travel wholesaler or its suppliers, with the exception of facilities or services which are not indicated in the brochure or flyer, but which may be considered as normal to Canadian travellers (e.g. telephone service, electricity);

  e) include clauses denying responsibility for staff or agents who make misleading statements or for negligence by staff in making appropriate travel arrangements;

  f) advertise a travel service or facility or a flight for which a commitment has not been received from the relevant supplier or for which government approval has not been obtained;

  g) advertise prices which are only available on a small proportion of seats. A reasonable number of departures must be available, to a total of 10% of all departures, or 4 departures, whichever is greater;

- Advertisements for flights should include:

  a) details of transportation including the name of the carrier and type of flight. At the latest, such information should be available at the time of booking;

b) airfare in "from" statements, with disclosure of how the price was determined (i.e. first class, economy), price quoted in Canadian dollars (unless clearly stated otherwise), round trip or return fair where a one-way fare cannot be purchased, the total amount to be paid including all mandatory tax and service charges or a statement (close to the main price) "plus tax and service charges" that also describes the additional service charges;

c) advertising of previous price examples should be eliminated;

- Tour ads should include:

a) prices in "from" statement, with disclosure of how prices were determined (e.g. based on single or double occupancy). Prices should be quoted for a round trip air fare and accommodation, be expressed in Canadian dollars (unless clearly stated) and include all mandatory tax and service charges or a statement close to the main price stating "plus tax and service charges" and describing the additional charges;

b) no advertising of previous price examples;

c) details of transportation, including where possible, the name of carrier and type of flight;

d) full description of the service or an indication where the consumer can obtain a brochure or flyer which contains a full description as well as the advertiser's terms and conditions. If there is no such brochure or flyer, the service description, terms and conditions should be fully disclosed in the advertisement;

- Package Tour Brochures (or flyers in lieu of a brochure) should contain clear, comprehensive, accurate and up-to-date information to enable the client to make an informed decision. Specifically:

a) the legal name, registration number and phone number (at a registered location, which may be omitted by travel wholesalers) of the registrant responsible for publishing the sales brochure and for providing the travel arrangements offered;

b) details of the transportation, including (where possible) the name of the carrier, and the type of flight (charter or scheduled). At the latest, this information should be available at the time of booking;

c) date, time and place of departure and arrival (naming airport), scheduled stops and connections if they are conditions of the flight;

d) price quoted in Canadian dollars (unless clearly stated otherwise), round trip or return fair where a one-way fare cannot be purchased, the total amount to be paid including all mandatory tax and service charges or a statement (close to the main price) "plus tax and service charges", describing in detail the additional service charges (including the cost of membership in any travel club, mandatory travel insurance and departure tax, if these are conditions of sales). Unless the price is guaranteed, the brochure would have to disclose (in easily readable print and plain language) the conditions under which the price could be amended, and any limitations or restriction on the advertised fares;

e) a full description of the services, including any additional features or special arrangements included in the selling price, identification of any known problem areas, such as unreliable water and electricity or isolation factors. A broad-based warning statement should forewarn travellers of differences to expect between Canadian standards and those in other countries, including but not limited to: culture, government, labour, language, sanitation, utilities and water;

f) the terms and conditions governing the travel service or facility should be prominently featured, as should the contractual conditions under which the booking should be made and the penalties for cancellation. Booking terms and conditions should be in one section of the brochure, in readable type, and should not be on the front or back of the booking form (so the client can retain them);

g) information necessary to comply with national or international regulations (e.g. visas, health regulations);

h) an accurate summary of the details of any insurance coverage offered;

i) specific information on accommodation, including: the name of the hotel and nature of accommodation and facilities offered, including a complete explanation of the rating or grading system used, explanation if price varies according to accommodation type, availability of wheelchair access, heating and air conditioning arrangements, map showing the location of each advertised hotel and general surroundings with accurate distances (stated in terms of walking or

driving to centers of attraction), and photographs (taken within the last five years) or representative sketches of rooms and actual location.

7) Resolution Mechanism and Penalties

- An arbitration process is proposed, through which travellers could obtain a negotiated solution when complaints could not be resolved with the registrant through existing mechanisms. The judgment of the arbitrator would be binding on both parties;

- Penalties for offenders under the act would include: termination or suspension of registration, restitution to the consumer, publication of offenders' names, minimum fines increasing with successive convictions, and the correction of advertisements at the offender's expense.

8) Travel Industry Compensation Fund

- The parameters of the fund should be increased to set a maximum payment per traveller of $5,000 and a maximum of $3 million due to the failure of any single registrant. The maximum book value of the fund should be raised to $5 million and the level to trigger special assessments to $3.5 million;

- It is proposed that contributions into the fund be increased: initial ones from head offices to $2,500, from branches to $1,250, ongoing contributions from wholesalers to $15 per $10,000 of gross sales;

- Subrogation should be altered, so that when the fund pays a claim it is the Crown that is subrogated to the claimant's position (i.e. pursuing the claim on the claimant's behalf). Money that the Crown so collects would become part of the fund;

- A limit should be set on the term of service of a member of the board of trustees.

9) Travel Industry Council

- It is proposed that an independent industry council be created, to which all registrants would belong. Such a council could be assigned a range of tasks, which could include:

  a) monitoring the implementation of advertising regulations (with the assistance of association members);

  b) cooperating with industry associations to prepare educational material for the general public and those serving them;

c) approving and reviewing standard terms and conditions to ensure they meet regulation requirements;

d) compiling an industry-wide code of ethics and standards of performance, legislated through the regulations;

e) preparing an industry-wide glossary of terms;

f) approving educational programs which offer appropriate travel training courses;

g) tracking future trends in the industry;

- The board of directors of the council would consist of twelve individuals. Half of these could be drawn from the range of registrants under the act; the other half could represent public interest and other fields of expertise, such as law. The Ministry would also be represented by the registrar or his appointee.

38. The Prearranged Funeral Services Act

THE DEATH CARE SECTOR

The death care sector is regulated by three pieces of legislation - the Funeral Services Act, the Prearranged Funeral Services Act, and the Cemeteries Act. The latter two acts are the responsibility of the Ministry of Consumer and Commercial Relations. The Funeral Services Act is the responsibility of the Ministry of Health.

The Legislative Review Project undertook a review of the Prearranged Funeral Services Act, and the Cemeteries Act. In addition, the review team assisted the Ministries of Health and Consumer and Commercial Relations in carrying out a joint parallel review of the Funeral Services Act. The review of the Funeral Services Act is currently in the final stages.

The following section provides a summary of the review project's proposed direction with respect to the death care legislation under the Ministry of Consumer and Commercial Relation's jurisdiction. It should be noted that, at the time of this report, a new act regulating prepaid funerals is awaiting second reading. It has incorporated many of the recommendations of the Legislative Review Project.

PREARRANGED FUNERAL SERVICES ACT

BACKGROUND

The purpose of the Prearranged Funeral Services Act is to regulate agreements for prepaid funeral services and to provide protection for the trust money held on behalf of purchasers under such contracts.

The act is assigned to the Minister of Consumer and Commercial Relations but administered by the Board of Funeral Services, a self-regulating professional body appointed through and responsible to the Ministry of Health under the Funeral Services Act.

As a result of a series of incidents involving misuse of prearranged funeral trust funds, the Legislative Review Project was instructed at the outset to expedite the review of the Prearranged Funeral Services Act. Accordingly, the first phase of the review focused exclusively on issues related to prearranged and prepaid funerals.

The specific objectives of the review were as follows:

- to gain a general understanding of the social and economic trends that influence the demand for this service;
- to suggest possible amendments which would enhance the bargaining power of the consumer in this transaction;
- to bring forward proposals for changes which would minimize the risk to trust funds;
- to identify and evaluate various alternate methods of providing compensation to consumers who suffer losses through fraud, misappropriation or bankruptcy.

INFORMATION-GATHERING PROCESS

1) Consultation

a) Interest groups

A series of meetings was held with each of the groups having a special interest in this area, specifically the Ontario Funeral Services Association, the Board of Funeral Services, the Ontario Federation of Memorial Societies, Guaranteed Funeral Deposits of Ontario, the Consumers' Association of Canada (Ontario) and the Canadian Life and Health Association.

In addition, letters seeking written positions on an extensive list of specific issues were sought from all of these groups, as well as several funeral home operators who are not members of the Ontario Funeral Services Association.

b) Businesses

Interviews were conducted with representatives of a number of insurance companies that sell policies to fund prepaid contracts. Several trust companies were also asked to comment on certain issues relating to trust accounts. Discussions took place with Reed Stenhouse Personal Insurance Ltd., regarding bonding and the possibility of a collective bond for this industry.

c) Ministries

As the ministry responsible for the Board of Funeral Services, the Ministry of Health had a significant interest in the progress and outcome of the review, and was therefore an active participant in the consultation process. Representatives from this ministry attended most of the meetings with the interest groups and provided valuable input regarding the administration of the act and the interrelationship between the Prearranged Funeral Services Act and the Funeral Services Act.

Interviews were held with both legal and operational personnel at the Loan and Trust Branch and the Insurance Division of the Ministry of Financial Institutions. These consultations focused on issues related to funeral insurance plans, trusting requirements and the role of fraternal societies in this sector.

In addition, comments were sought from the Ontario Women's Directorate.

d) Business Practices Division

The review team ensured that policy, legal and administrative staff of the Business Practices Division were consulted frequently throughout the review process. The registrars of the travel and motor vehicle areas provided useful information regarding the compensation funds in place in these sectors. Staff of the Investigation and Enforcement Division also provided valuable input.

e) Other jurisdictions

Telephone interviews were conducted with government officials and industry representatives in certain other jurisdictions (e.g. Massachusetts, Illinois and Michigan) regarding legislative reforms presently being considered or implemented in these areas.

2) Research

Relevant text books, articles from consumer and industry journals and newspaper clippings on the subject of prepaid funerals were reviewed.

Policy papers, briefing notes, issue statements and other documentation on the subject were obtained from the Busines Practices Division.

Statistical data was gathered from a number of sources including the records and surveys of the Board of Funeral Services, Statistics Canada, the registrar general's office and the Federal Trade Commission.

A sampling of prepaid funeral contracts was also reviewed. Considerable attention was paid to legislation in other jurisdictions. A comparative review of the legislation in all the Canadian provinces was carried out. Particular emphasis was given to the most recently enacted statutes and draft bills presently under consideration. In addition, the legislation of certain U.S. states such as Illinois, Michigan, Oregon and Florida was considered.

GENERAL PROBLEM AREAS

Within the last several years, the amount of money invested by Ontario consumers in prearranged funerals has grown dramatic-

ally from $51 million in 1980 to over $225 million in 1987. Over one million Ontario consumers have entered into agreements with funeral directors under which substantial amounts of money (average approximately $3,000) have been paid over to be held in trust pending future delivery of the funeral goods and services. If the current trend continues, the number of consumers investing in such plans will double within the next five years.

That there is a significant element of risk to such funds has been clearly demonstrated by past instances of misappropriation. Between 1982 and 1986, the directors of four funeral establishments misappropriated close to $400,000 of consumer money (excluding interest). There is a growing concern that there may be even more widespread abuses occurring that have yet to surface.

The provisions of the act and the regulations that govern the handling of trust funds are widely regarded as inadequate to ensure either that the funds are deposited in the first instance, or that they are held securely, once deposited. Funeral directors at present are permitted to have fairly easy access to the funds with very little in the way of documentation required before withdrawal can be made. Moreover, the Ministry is not provided any power to ensure that sufficiently rigorous inspections or investigations are carried out by the Board of Funeral Services. In fact, the board, in administering the act, is not required to account to the Ministry of Consumer and Commercial Relations at all.

Concern has also been expressed about the role of insurance companies in this market. There is a growing trend toward the use of insurance plans as funding vehicles for prepaid funeral plans. These transactions are not regulated under the act.

Finally, the problem that has received the most attention is the absence of any mechanism whereby consumers who suffer losses can be reimbursed. It has been pointed out that in a number of other industries (i.e. motor vehicles, travel, real estate, there are bonding requirements in place or a compensation fund available to reimburse consumers. Both industry and consumer groups have been lobbying intensively for the introduction of some similar system in the funeral sector.

SPECIFIC ISSUES

1) Who May Sell Prearranged Funeral Services?

The act prohibits any person other than a licensed insurer or a funeral director from entering into an agreement to provide or make provision for prearranged funeral services.

Notwithstanding the reference to insurers, funeral directors

have traditionally been the only source through which such contracts have been available. Insurance companies have played largely an ancillary role by offering insurance plans through which such contracts may be funded. Although the regulation of the sale of such plans is a separate issue which requires thorough examination, the broader question is whether the consumer interest is best served by excluding alternate providers from this market place.

The general purpose of the restrictions is to ensure that the consumer is entering into these transactions with people who are in a position to guarantee delivery of the services, and who are appropriately regulated.

Although the industry has argued that funeral directors are the only class of people who meet these criteria, a careful review of the question was necessary in order to ensure that competition is not being unduly restricted.

2) Regulation of Funeral Insurance Plans

A number of insurance companies offer special funeral insurance plans which can be used as an alternate method of securing the price of a prearranged funeral contract.

Under such a plan, the purchaser acquires a policy, the value of which is sufficient to cover the cost of the preselected goods and services. Upon the purchaser's death, the policy proceeds are payable to the funeral establishment with whom the purchaser has contracted, either directly by way of designation as the beneficiary, or indirectly through an assignment.

Because these plans do not involve the payment of funds to the seller of the funeral services prior to the death of the purchaser, they are beyond the scope of the act. Both consumer and funeral industry representatives expressed the view that amendments were required to bring such plans within the regulatory framework of the act. Areas that were identified as needing attention included the role of the insurance agent in the prearrangement process, the methods used to promote these plans, the sufficiency of the disclosure provided to the consumer and the ability of the board to inspect insurance-funded contracts.

3) Scope of the Contract

The typical prepaid funeral contract involves a "guaranteed price" agreement, whereby the seller undertakes to fulfill the contract upon the purchaser's death at no additional cost. The seller takes the risk that the interest earned on the funds paid will be sufficient to cover the future cost of delivery in return for acquiring the future business.

Because of the unusually long time delay between the selection and delivery of the goods (eg. caskets, urns or vaults), the

specific items chosen are often no longer available at the time the contract is to be fulfilled. Most contracts, therefore, provide the seller the right to substitute goods of "equivalent value". The potential for unfair practices in such cases is clear, especially as the purchaser's survivors are generally in a state of acute emotional distress and are therefore neither inclined nor able to deal with the matter effectively.

Another problem concerns the common practice of including in the contract a prepayment for "disbursements". These are services which the funeral director undertakes to arrange, but which must be acquired from a third party (e.g. coroner's fees, death registration, clergy stipend, etc.). Because the funeral director obviously cannot control the future costs of the items he or she does not provide directly, there is a greater risk that the funds paid will ultimately be inadequate to cover them.

4) Content of Contracts

There are no requirements in either the act or the regulations governing the form or the content of contracts. A review of a sample of typical contracts disclosed that few of them set out a sufficiently detailed description of the goods and services purchased. Nor, in most cases, do the contracts include information about significant aspects of the transaction, such as how the interest earned will be handled, whether there is a "cooling off" period, or the manner in which the contract may be terminated. This general lack of disclosure is particularly serious, given that the contract is usually the only record survivors have of the bargain made between the purchaser and the funeral establishment.

5) Treatment of Interest

Several questions arise with respect to what should be done with interest earned from prearranged funeral sale trust accounts. They include:

a) Should all the interest (including compound interest) be retained in the trust account until the contract is fulfilled?

b) Who should get the "surplus" funds when the contract is fulfilled?

c) Should the increase in costs over time be monitored and controlled?

The existing legislation requires the seller to hold all funds received, together with any interest accured thereon, in trust until the contract is fulfilled or the agreement has been cancelled. The act does not specify who is entitled to the compound interest, so presumably a seller could argue that he or she is entitled to withdraw at any time. Upon cancel-

lation, the purchaser is entitled to get back all the principal and the interest earned, less an administration fee not exceeding $150.

The act is silent concerning the treatment of surplus in the event that the accrued value of the trust fund exceeds the cost of fulfilling the contract. The disposition of surplus, if any, is therefore, dependent upon the terms of the particular contract. Where the contract makes no reference to surplus, the seller is presumed to be entitled to retain it.

There is some concern that funds held in trust for long periods could compound to values far in excess of the future cost of the funeral. This has raised the question of whether the surplus should be returned to the estate. If it is not, the "pre-need" customer ends up paying more than would be the case if the same service was purchased "at need".

However, since the seller takes the risk of inflation over-taking the accumulated value of the funeral, it could be argued that he or she is entitled to realize the benefit of an occasional surplus if it is available. In fact, sellers may be reluctant to guarantee the price if they do not have recourse to surplus funds to offset those instances where a deficiency exists.

6) 100% Trusting and Fees for Prearrangement

The existing legislation requires that 100% of the funds received under a prearrangement contract be deposited in trust. There is no specific allowance at present for time spent by a funeral director on prearrangement. It is assumed that these costs are built into the professional service charges as a normal cost of doing business. It has been suggested that when a client prearranges without prepaying, the funeral director should be entitled to charge for this service. Some interests have also suggested that a funeral director should be entitled to make an additional charge, or alternatively, to retain a portion of the funds paid under contracts as an up-front prearrangement fee. This would make allowance for coverage of costs for staff and overhead at the time they are incurred.

7) Solicitation of Prearranged Funeral Plans

Almost every group consulted during the review raised the issue of door-to-door and telephone solicitations of death care services. There appears to be a broad consensus that these particular methods of soliciting sales are not appropriate in this sector, and ought to be prohibited under the amended legislation.

The prevailing view appears to be that information about prearrangement services can be circulated adequately through passive techniques such as direct mail and brochures. Random calling campaigns such as telemarketing are seen by many as

intrusive, high-pressure sales tactics to which the elderly may be particularly vulnerable. Further, there is concern that such calls may be inordinately distressing for people who are ill or recently bereaved.

8. Handling of Trust Funds

The regulations prescribe the procedures for handling and managing trust funds. Although these were tightened in 1984, there may still be room for improvement.

Three main categories of risk were identified. These risks relate to:

a) whether the money gets deposited into a trust account;

b) whether it is held securely in the financial institution;

c) whether it can be withdrawn for other than the specified purpose.

Some of the specific problems include a lack of appropriate procedures for receipts, an absence of ongoing notification procedures and insufficiently tight withdrawal requirements. Amendments are clearly necessary to reduce the risk of misallocation and misappropriation.

9) Inspection and Accountability

The Board of Funeral Services is charged with the duty of carrying out periodic inspections of books, documents and records pertaining to prearranged funeral plans and the related trust accounts. Frequent and thorough inspection is necessary in order to ensure compliance with the act. Although the board has increased its resources and is, therefore, able to carry out more regular inspections, there is still considerable room for improvement.

A serious deficiency in the act is the absence of a reporting relationship between the board and the Ministry of Consumer and Commercial Relations.

10) Compensation for Consumers

Between 1982 and 1986, approximately 250 consumers were victims of misappropriation of prepaid funeral trust funds. Although some of these people received partial compensation from the new owners of funeral homes and others were reimbursed through voluntary industry initiatives, many never recovered any portion of their trust funds.

As a result, both consumer and industry groups have lobbied intensively for the introduction of a mechanism to compensate consumers who suffer losses.

Various consumer protection measures have been proposed, including bonding of funeral establishments, the imposition of a mandatory levy on funeral homes in the event of misappropriation and the establishment of an industry-financed compensation fund.

Although bonding offers some degree of consumer protection, procedures for processing claims are slow and cumbersome. Consumers may have to wait up to two years to receive compensation because the bond is held to see if others claim against it. Also, bond levels may prove inadequate to cover claims. Currently, 144 firms hold trust funds in excess of $5,000,000 and 55 of these firms hold over $1 million. Four firms hold over $3 million.

A mandatory levy could also be considered. If such a measure is to be introduced, an equitable method of collecting these payments would have to be developed.

The most popular method of compensation is the industry-financed compensation fund. Such funds have proven very successful in the travel and motor vehicle industries. There are several issues which would have to be resolved in establishing a compensation fund for the funeral services industry. These include how the money should be raised, how large the fund should be, who should administer the fund and who should carry the cost of administration.

PROPOSED DIRECTION:

In developing the option for reform, consideration was given to ensuring that they were consistent with the following principles:

- The legislation should ensure, to the extent that it is possible to do so, that the seller is in a financial position to honour his obligations at the time the contract is fulfilled;

- Funeral directors should not be allowed a monopoly on the prepaid sale of those services which others are capable of providing.

- Prepaid funeral plans should not be more lucrative for a funeral director than is the case where the funeral is arranged "at need";

- Purchasers should be afforded maximum flexibility to accommodate religious or cultural practices and to cancel or transfer plans;

- All sellers of competing prepaid plans should be accountable to the same regulatory body;

- All competing sellers should be governed by a consistent

set of rules;

- Purchasers should be afforded maximum disclosure of their rights and obligations;
- The act and regulations must minimize to the extent it is possible to do so, the risk of misappropriation;
- A mechanism must be provided for compensating a purchaser in the event of misappropriation;
- The legislation should be drafted so as to anticipate, as much as possible, future changes in the marketplace;
- Amendments to this act should be made with a view to the consistent application of principles and objectives to all sectors of the death care industry.

More specifically, the proposed direction is as follows:

1) Who Should Sell Funeral Services Pre-need?

It is proposed that only holders of a funeral services establishment license should be entitled to enter into pre-need funeral contracts with consumers. Insurers are engaged in the business of selling insurance, not funeral merchandise and services, and the act should be amended to reflect this.

2) Regulation of Funeral Insurance Plans

The regulation of these plans and the sales personnel who promote them is already provided for under the Insurance Act. It would, therefore, be duplicative and involve jurisdictional problems and conflicts to bring these plans within the scope of the Prearranged Funeral Services Act. However, the board should be clearly be entitled to examine a funeral establishment's records concerning such plans and the contracts they fund. In addition, input from the Ministry of Consumer and Commercial Relations should be sought by the Ministry of Financial Institutions prior to issuing approvals for such plans.

3) Scope of The Contract

It is proposed that the scope of a prepaid funeral contract be limited to only those goods and services that are available exclusively through a funeral director so that he or she has a degree of control regarding availability and price. Therefore, the act should be amended to prohibit the seller from accepting prepayment for disbursements or cemetery supplies.

4) Content of Contracts

It should be required that all contracts contain, at a minimum, certain specific information including:

a) whether the price for goods and services is guaranteed;

b) whether payment for disbursements is guaranteed;

c) how surplus funds will be handled;

d) who is responsible for additional disbursements not covered in the contract;

e) whether the amount represents full payment;

f) a schedule detailing goods and services and their respective prices in a prescribed manner;

g) details of the arrangements that may be made if death occurs outside the municipality;

h) a statement of cancellation rights.

The new provisions should further require that all proposed forms of agreement and promotional material be submitted to the Ministry or the Board of Funeral Services for approval.

5) Treatment of Interest

It is proposed that all interest (including compound interest) be held in trust during the lifetime of the client. The act should also require the return of surplus (where it exists) to the purchaser's estate. The maximum increase in costs permitted should parallel the Consumer Price Index. The CPI as an objective measure could also be used to establish a deficit that could be made up from the estate.

6) 100% Trusting and Prearrangement Fees

It is proposed that the legislation should continue to require 100% trusting. No prearrangement fees should be permitted and the legislation should state this explicitly.

A purchaser should be entitled to cancel a contract at any time and receive reimbursement of all the funds on the trust account, less an administration fee as set out in the regulations.

7) Cancellation Charges and a Cooling-Off Period

It is proposed that the maximum administration fee which may be levied on cancellation be maintained at the present figure of $150. No minimum fee should be required.

In the event of due cause (declining standards, change of ownership, substitution of merchandise), the purchaser would have a right of early withdrawal with no penalty.

A cooling-off period consistent with the Consumer Protection Act is proposed, during which no cancellation charges shall be levied.

8) Solicitations of Prearranged Funeral Plans

It is proposed that door-to-door and telephone solicitations of sales of prearranged funeral services be prohibited.

All promotional material should be subject to Ministry approval.

9) Handling of Trust Funds

It is proposed that the following changes be made to the regulations:

- All money received by a funeral director shall be deposited within 10 days (or some period longer than the statutory cooling-off period to be provided);
- A duplicate receipt for the money shall be completed and signed by both the client and the funeral director and one copy provided to the client. The receipt must state the manner of payment (cash, cheque, or money order);
- Where cash is provided for payment, a witness must be present and must endorse the receipt;
- No account shall exceed the CDIC deposit insurance limits;
- Proof of deposit shall be forwarded directly to the client by the depository within 21 days of the funds being deposited;
- The depository shall issue an annual statement of account directly to the client;
- A certified copy of a document showing proof of death and provided by a competent government authority, or written confirmation of cancellation signed by the client or his or her personal representative must be provided before the depository may release trust funds;
- In the event that a funeral establishment goes out of business or changes ownership, each client for whom funds are being held and the depository holding the funds shall be notified immediately.

10) Inspection and Accountability

It is proposed that the inspection capacity of the board should be enhanced. The cost of hiring additional inspectors should be paid by the industry through an increase in annual licensing for the funeral establishment.

The board should be required to account to the Ministry of Consumer and Commercial Relations regarding the administration of the act.

11) Compensation for Consumers

The interest groups appear to accept the introduction of a combination of consumer protection methods, including bonding, a mandatory levy and the creation of a compensation fund.

It is therefore, proposed that a collective bond of up to $1 million be purchased. The premiums would be paid by every funeral establishment in the province. In addition, a $1.5 million compensation fund should be established to provide further recourse for consumers. This fund would be created by collecting a flat fee from every establishment and an annual payment based on the volume of business. In the event of a misappropriation exceeding this amount, a mandatory levy determined by the volume of business should be collected from every funeral establishment. It is suggested that the administrative costs of inspection, auditing, claim assessment and collection of fees be assumed by the compensation fund. The management of the compensation fund should be undertaken by a committee of the Board of Funeral Services. This committee would adjudicate claims and recommend assessments. It would reserve the right to impose the mandatory levy if there was a misappropriation which exceeded the bond and compensation fund.

CONCLUSION

The Legislative Review Project presented the foregoing proposals to the Ministry of Consumer and Commercial Relations in March of 1987. On June 25, the Minister introduced Bill 103 - An Act Respecting Prearranged and Prepaid Funerals. Many of the review project's proposals are reflected in the bill, which was re-introduced as Bill 27 on November 19, 1987. At the time of this report, the bill is awaiting second reading.

39. **The Cemeteries Act**

THE CEMETERIES ACT

BACKGROUND

The Cemeteries Act regulates the establishment, maintenance and preservation of cemeteries in Ontario. The overall purpose of the act is to ensure that cemeteries are financially stable and maintained in a manner acceptable to the public.

To this end, the act requires that all applications for the establishment or enlargement of a cemetery be approved by both the municipality and the province. Cemetery operators must retain a portion of their revenue in trust to cover ongoing maintenance costs. Provision is made for the inspection and auditing of these "perpetual care" accounts. Procedures are also set out regarding the handling of funds paid by those who buy cemetery plots and/or services in advance of need. Provisions pertaining to maintenance standards, prohibited activities, inspection, abandoned cemeteries and disinterment procedures are included.

All cemeteries became subject to provincial regulation with the enactment of the Cemeteries Act in 1913. The last major revision to the legislation was made in 1955. The act is administered by the Cemeteries Regulation Section of the Ministry of Consumer and Commercial Relations.

INFORMATION GATHERING PROCESS

1) Consultation

a) Interest group meetings

A series of meetings was held with each of the groups having a special interest in this area. A detailed list of participants is as follows:

Toronto Trust Cemeteries
Memorial Gardens (Ontario) Ltd.
Ontario Association of Cemeteries
Ontario Monument Builders Association
Commonwealth War Graves Commission
Association of Municipalities of Ontario
Kingston and area cemeteries, funeral directors
Ontario Advisory Council on Senior Citizens
Consumers' Association of Canada (Ontario)
Federation of Ontario Memorial Societies
The Board of Funeral Services
Ontario Funeral Services Association

In addition, interviews with various individual cemetery operators, monument wholesalers and retailers and interested members of the public were conducted.

b) Cemeteries Regulation Section

Extensive consultation with staff at the Cemeteries Regulation Section of the Ministry of Consumer and Commercial Relations was carried out throughout the review process.

c) Ministry consultations

Meetings were held with representatives of the following ministries:

Ministry of the Attorney General (Public Trustee)
Ministry of Agriculture and Food
Ministry of Revenue
Ministry of Municipal Affairs
Ministry of Environment
Minister for Senior Citizens' Affairs
Ministry of Culture and Communications
Ministry of Health
Ontario Women's Directorate

d) Other consultations

Institute of Chartered Accountants
Ontario Hydro

e) Written submissions

Written positions on an extensive list of specific issues were sought from the following individuals, associations, organizations and ministries:

Cemeteries/cemetery associations

Toronto Trust Cemeteries
Ontario Catholic Cemeteries Conference
Ontario Association of Cemeteries
Memorial Gardens (Ont.) Ltd.
Cataraqui Cemetery Company (Kingston)
Park Lawn Cemetery Company Ltd.
Woodland Cemetery (Kitchener)
Hamilton Municipal Cemeteries

Religious organizations

Toronto Hebrew Benevolent Society
Evangelical Lutheran Church in Canada
Pentecostal Assemblies of Canada
Mennonite Central Committee
Ontario Catholic Cemeteries Conference
United Church of Canada

Anglican Diocese of Toronto
Presbyterian Church in Canada
Canadian Jewish Congress

Consumer groups

United Senior Citizens of Ontario
Ontario Advisory Council on Senior Citizens
Canadian Pensioners Concerned
Consumers' Association of Canada (Ontario)
Federation of Ontario Memorial Societies

Ministries

Ministry of the Environment
Ministry of Culture and Communications
Ministry of the Solicitor General (coroners'office)
Ministry of the Attorney General
Ministry of Revenue
Ministry of Health
Minister for Senior Citizens' Affairs
Ministry of Agriculture and Food
Ministry of Municipal Affairs

Other consultations

Trillium Funeral Services Inc.
Ontario Funeral Service Association
Board of Funeral Services
Institute of Chartered Accountants of Ontario
Association of Municipalities of Ontario
Ontario Genealogical Society
Commonwealth War Graves Commission
Ontario Monuments Builders Association

2) Research

Articles and newspaper clippings on issues related to cemetery operations and sales practices were reviewed.

Considerable data was submitted by the interest groups. Material obtained from the Cemeteries Regulation Section included correspondence, policy statements and survey results.

Considerable attention was paid to legislation in other jurisdictions. A comparative review of the legislation in all other Canadian provinces was carried out. In addition, the legislation of certain U.S. states was reviewed.

GENERAL PROBLEM AREAS

The Cemeteries Act is in many respects outdated and in need of a significant overhaul. The act has not been changed in any substantial way for over 30 years. This period has seen a number of important developments, such as the increase in

cremations, the growth of commercial cemeteries, and more aggressive sales techniques with respect to pre-need sales and cemetery supplies.

The perpetual care fund provisions are widely regarded as inadequate to promote self-sufficiency of cemeteries and to prevent the sites from being abandoned and becoming a burden on the taxpayer. The procedures for the passing of perpetual care and pre-need accounts are unworkable and largely unenforced.

In addition, many of the regulatory powers provided for in the act are administratively unwieldy and in some cases unnecessary. At the same time, there is an absence of regulatory authority in areas where it would be useful and where it would provide very significant protection for purchasers of cemetery services.

A number of changes have been suggested by different interests which, if they were to be implemented, would represent a significant departure from current practice. These issues relate to modifications to the perpetual care obligations; consistent rules for different cemeteries; restrictions on the sale of cemetery supplies; regulations regarding trust funds obligations; the location of cremations; and controls on solicitation.

A review of these issues, with a view to developing proposals for appropriate regulatory changes, was an extremely challenging task, given the diverse nature of the various types of cemetery operations. The act attempts to fit within its regulatory framework the full range of providers including religious, non-profit, municipal and commercial enterprises. Differential treatment is accorded through a system of exemptions. A review of the appropriateness of these exemptions was necessary to determine what changes are needed to ensure that the act is applied fairly and in a manner that does not prejudice the interests of the consumer.

SPECIFIC ISSUES

1) Establishing a Cemetery

The existing legislation requires that the establishment or enlargement of a cemetery, columbarium or mausoleum be approved by the Ministry of Consumer and Commercial Relations. Before any application is approved, however, a municipality must receive a detailed plan of the cemetery, and prepare an opinion which is submitted with the application to the Ministry.

Although it would be desirable for the Ministry to retain a central registry showing the size, type and location of cemeteries in the province, the question arises as to whether

the Ministry should play anything other than a passive role in the approval process. The establishment of a new cemetery is essentially a municipal zoning issue (with environmental considerations). The municipality has the authority to hold public hearings, assess impact and grant zoning changes for all land use proposals. In addition, the Ontario Municipal Board is an appeal body which would hear any case involving the refusal of a zoning application.

2) Perpetual Care

Cemeteries have only been required to collect money for perpetual care funds since 1955. These funds are intended to ensure that the cemetery lots and compartments in a columbarium or mausoleum are maintained into perpetuity.

At present, a levy of 35% of the cost of a lot, 20% of the cost of the mausoleum space or 10% of the cost of a columbarium niche is imposed at the time of sale. It is then deposited into the cemetery's perpetual care fund, which must be held in trust. Serious doubts have been raised as to whether these amounts are adequate, since it is very difficult to anticipate, with any certainty, what maintenance will cost in the future. The problem is compounded by the fact that older cemeteries may have little or no funds for perpetual care.

The issue of inadequate or non-existent perpetual care funds usually does not emerge as a problem for the cemetery while interments are being made. Maintenance costs can be covered out of the income generated from current lot sales. However, when the cemetery is full, the lack of perpetual care money will quickly become apparent, and, ultimately, the cemetery will be abandoned for maintenance by the municipality, imposing an ongoing burden on the taxpayer.

A number of alternatives have been put forward to address these problems. Some religious cemeteries have sought complete exemption from the obligations of perpetual care funds. The maintenance costs of cemeteries would be assumed by these religious organizations. Another alternative is imposing a higher perpetual care levy. However, this could drive cemetery lot prices up higher than they are now, and could be unacceptably high for some purchases.

Another suggestion has been that cemeteries should be allowed to rent or lease burial rights for certain fixed terms. These rights could then be renewed, or exercised by others, which would bring in an ongoing source of revenue to the cemetery. Consumers would also benefit in that they would not have to incur the initial perpetual care charge. This lease option would presumably only be offered in addition to the present perpetual care system, not as a replacement for it.

One important benefit of the lease option is that existing cemeteries, which tend to be located closer to the heart of

major urban centres, would take relatively longer to fill. Therefore, many urban cemeteries would remain in use, and bereaved relatives could easily visit them.

Although the leasing of burial rights has been a common practice for many years in a large number of European countries, it would be a novel departure from North American tradition. There would also be important questions related to the length of term before renewal, as well as the issue of rules governing final disposition.

3) Cemetery By-Laws and Regulations

Under the present act, a cemetery owner may make by-laws pertaining to lot sales, burials, erection of monuments or tombs and the general use of the grounds. All by-laws or regulations made by the cemetery owner are filed with and approved by the Ministry.

There may be merit in making substantial changes to the requirements pertaining to cemetery by-laws. The purpose of these changes would be to ensure that:

- by-laws are not used to discriminate against outside suppliers;
- by-laws include certain consistent practices.

To meet these objectives, certain common themes could exist in all regulations enforced by the cemetery owner. These common themes include:

- standard notification procedures to reclaim an unused lot;
- a standard formula for repayment of a lot-owner when reclaiming an unused lot;
- consistent and non-discriminatory service fees, whether goods are purchased from the cemetery owner or another supplier;
- no discrimination against any burial practice or custom which is consistent with provincial health and safety standards;
- standard disinterment/reinterment procedures.

4) War Graves

Although the current act prohibits any alteration to a marker placed on a veteran's grave by the Last Post Fund without written consent of that organization, it has been suggested that the legislation should be broadened to accommodate the mandates of other organizations which are responsible for the

graves of veterans.

The Commonwealth War Graves Commission, representing all member countries of the Commonwealth, has the mandate to mark and maintain the grave of any person who died in the two World Wars, to build memorials to those with no graves and to keep records and registers. The Federal Department of Veterans' Affairs has, as part of its mandate, the duty to memorialize and care for the graves of all veterans. The Last Post Fund has the mandate to cover the cost of a veteran's burial anywhere in the world, if no other organization offers assistance for burial or commemoration.

Although these organizations have specific responsibilities, they have similar concerns, which include altering or removing markers erected by that organization, moving a veteran's grave without written consent, mishandling of records, and restricting the ability to erect a standard marker offered by that organization.

It has been proposed that these concerns be addressed through regulatory change.

5) Rights of a Lot Owner

At present, the Cemeteries Act is silent regarding the rights of a lot owner.

It is evident that as a general principle, cemetery owners must have the authority to pass regulations in order to fulfill many of their obligations. A cemetery owner has the responsibility to ensure all burials are conducted in a decent and orderly manner, to preserve and maintain the property, to protect memorials, buildings and other natural features of the cemetery from vandalism and to ensure the health and safety of the public when visiting the cemetery.

However, it has been suggested that regulations passed by a cemetery owner should in no way restrict or limit the rights of a lot owner. Those persons who have purchased a lot should have specific rights, including the right to an identifiable grave, to memorialize, to be assured of unrestricted access to a grave for visitation and to appeal any discriminatory regulation enforced by a cemetery owner.

6) Abandoned and Closed Cemeteries

Presently, the legislation states that, if the cemetery owner is unknown, or is unable to maintain a cemetery, the municipality assumes responsibility.

Although it may be considered appropriate that the municipality should have the ultimate responsibility over abandoned sites, it has been suggested that specific requirements over closed and abandoned sites be identified in new legislation. For example, the act could clearly address the question of

responsibility in a case where a cemetery owner who is operating more than one site, abandons one of those sites. Also, the act could provide the power to close a cemetery and establish suitable notification and appeal procedures.

7) Solicitation

Some cemeteries are taking a more active role in promoting pre-need sales. Unfortunately, this has also been accompanied by complaints about aggressive sales staff, and high-pressure and misleading sales tactics. The present Cemeteries Act allows for the licensing of cemetery sales representatives. However, by regulation, all cemeteries are exempt from this requirement.

A number of suggestions have been made to address the problem. They include mandatory licensing and bonding of all sales staff; requiring sales personnel to be paid on a salaried basis, not a commission basis; and forbidding telephone and door-to-door solicitations.

The issue of door-to-door and telephone solicitations has been particularly contentious. Every consumer group and religious organization canvassed during this review urged that these sales methods be banned for all parts of the death care sector. The groups view this industry as unique, and believe that the purchaser of funeral services is usually vulnerable to high-pressure sales tactics. There is considerable concern that the ill or recently bereaved may be extremely offended if contacted through a random telemarketing campaign.

8) Consumer Information and Disclosure

The existing legislation is silent with respect to consumer information and disclosure, other than requiring that purchasers be provided with a statement setting out the particulars of the plot and requiring public access to certain records.

One of the most frequent complaints by consumer groups is that purchasers do not have ready access to information needed to make informed and comparative choices. Further, consumers who do enter into contracts are often confused about the nature and effect of the agreement.

A number of mechanisms may be considered to facilitate disclosure, such as the mandatory provision of price lists, itemized pricing for goods and services, and standardization of contracts.

9) Advertising

Cemeteries have traditionally taken a very low-key approach to advertising. The existing act is silent regarding advertising by cemeteries. However, the Business Practices Act and the Competition Act both contain extensive provisions pertaining

to misleading and deceptive advertising or representations.

The question arises as to whether advertising should be subject to regulation under this Act.

10) Pre-Need Sales - Protection of Trust Funds

Consumers are becoming increasingly interested in securing burial arrangements in advance of need. Prearrangement ensures that personal wishes regarding place and manner of burial and memorialization are fulfilled, and it serves to relieve bereaved relatives of the burden of last-minute decision-making. In addition, there may be cost savings associated with prepayment.

Although some cemeteries have always been active in promoting pre-need sales, and, in fact, generate the bulk of their business from pre-need plans, more and more cemeteries are beginning to offer this service in response to consumer demand. The amount of consumer dollars being held by cemeteries pending fulfillment of future obligations is increasing rapidly and is now in excess of $15 million.

A number of concerns have been raised regarding the existing provisions relating to the disposition of funds acquired through pre-need sales.

The current regulations define a pre-need "contract" as one "whereby cemeteries supplies or cemetery services are to be furnished or supplied upon the death of a person who is alive at the time the agreement is made". Cemetery plots are delivered at the time of purchase, and therefore, the portion of the purchase price attributable to this component is not considered money received under a pre-need contract.

Every cemetery owner who sells pre-need is required to establish and maintain a pre-assurance fund. The fund is, in most cases, held and administered by a trustee (the public trustee or a trust company registered under the Loan and Trust Act). Some cemeteries are, by regulation, permitted to administer their own fund. The regulations require 65% of the funds received under a pre-need contract to be deposited into the fund within one month of receipt. Withdrawal provisions are ill-defined.

The monitoring procedures outlined in the act are entirely unworkable. Although the legislation calls for a passing of accounts before a Surrogate Court judge, few cemeteries have passed accounts since the early 1970's. Furthermore, the Cemeteries Regulation Section does not have a financial examiner to properly review accounts (accounts have never been professionally audited). In order to better protect consumer trust funds, procedures similar to those required under the new Prepaid Funeral Services Act could be introduced. This proposal calls for 100% vesting of funds received under prepaid contracts and the placing of each purchaser's fund in

a separate trust account at an approved depository. Withdrawal is permitted only upon proof of cancellation or death. It has also been suggested that a manageable inspection program similar to that used by the Board of Funeral Services could be established.

Some cemetery owners are strenuously opposed to any suggestion that 100% vesting be required. It is their position that a proportion of the funds paid are required to pay salespeople and ongoing administrative costs. They see any move towards 100% trusting as effectively discouraging pre-need sales, a result that would not be in the consumer's interest.

Those in favor of 100% vesting point out that, until delivery of the services, the funds belong to the purchaser. Because of the possibility of cancellation, the total amount paid must be retained in order to ensure full return if that right is exercised. Sixty-five percent vesting is not sufficient to offset cost increases due to inflation. In addition, a number of groups view 100% trusting as an effective deterrent to the use of commissioned sales staff, because the funds would no longer be available to pay commissions.

11) Delivery of Goods Purchased Pre-Need

Another problem associated with pre-need sales by cemeteries arises by virtue of the fact that some components can be delivered immediately. Such items are treated as if they are "at need" purchases even though they are bought in a pre-need context. Funds received in respect of delivered goods are, therefore, not required to be held in trust.

This distinction provides sellers with considerable incentive to encourage consumers to take delivery of a monument either by having it erected at the grave site or stored.

Although it is acknowledged that some purchasers want immediate delivery, there is concern that, in many instances they may not be aware of the finality of the purchase and that cancellation may be precluded. (Unlike a cemetery plot, which may be resold, a monument cannot be re-engraved.)

12) Compensation Fund

The existing act does not provide a mechanism whereby consumers who suffer losses through misappropriation or misallocation of pre-need funds can be compensated.

Although instances of misappropriation or misallocation have not been serious, they have been known to occur. Due to the inadequacy of current inspection procedures there may actually be many more which have not yet come to light.

Most individual pre-need trust funds do not involve substantial amounts of money. However, if a major misappropriation were to occur, the total impact could be significant.

Consideration could be given to the creation of a compensation fund similar to that introduced in the Prepaid Funeral Services Act.

13) Cremation

Under the existing legislation, cemeteries may establish a crematorium. The provision is permissive in that it does not prohibit others from providing this service, so long as they comply with municipal zoning, environmental/health standards and the act's approval process.

A number of groups have suggested that the legislation be tightened to restrict the location of crematoria to cemetery property. The view has been expressed that if funeral establishments, for example, were to operate crematoria, the risk of unscrupulous practices, such as switching caskets, would be substantially increased. In addition, some groups feel strongly that the services provided by each of the three death care sectors - funeral homes, cemeteries and monument dealers - should be strictly segregated for the purposes of administrative ease and fair competition.

Others view any proposal to limit the location of cremation as an unwarranted interference with consumer choice which would only serve to preserve an existing monopoly.

Scattered throughout the act are other provisions related to the cremation of human bodies. Presently, a cemetery owner may provide a crematorium, set by-laws about cremation and establish the fees to be charged. Provisions in the act also state the requirement for a coroner's certificate showing the cause of death and a burial permit before a body may be cremated.

Since the act is silent on a number of issues, it has been suggested that, as part of the regulations of a new act, certain requirements pertaining to cremation should be included. In addition to the current regulations, there would be the requirement for the sale and use of a fully combustible casket and a specification on the coroner's certificate indicating the presence of a pacemaker. These provisions would greatly reduce some of the difficulties encountered by the providers of cremation services.

14) The Sale of Cemetery Supplies

Under the current regulations, cemetery supplies are defined as including burial vaults, monuments, markers, flowers and wreaths. Many of these items are also available through other sources, including funeral homes and specialized retailers.

The participation by cemeteries in the monument/marker market has recently become a contentious issue. Although many

cemeteries have been selling these items for decades and some are in fact expressly entitled to do so under their corporate articles, some groups have called for amendments which would remove that right.

The Ontario Monument Builders Association has claimed that the sales tactics used by some cemeteries in promoting monument sales are detrimental to the consumer in that they involve deceptive representations, "tied-selling" and "predatory pricing". The ultimate effect of these practices, they assert, is to reduce consumer choice by discouraging comparison shopping and squeezing competitors out of the marketplace.

Cemeteries have denied engaging in these practices and have challenged these claims in court.

In addition, cemeteries have the responsibility of maintaining their property in perpetuity. Since cemetery owners are concerned with the orderly development and appearance of the cemetery, this raises the question as to whether they should have some control over the material standards of monuments and erection specifications.

15) Price Regulation

At present, the prices charged by cemeteries for plots and related services, including monument installation, are subject to approval by the Ministry.

The view has been expressed that requiring rate approval on a routine basis is administratively unwieldy, causes substantial delays, and is unnecessary for consumer protection since the market for cemetery services is competitive. Most areas of the province are quite well serviced by a variety of cemetery types - religious, non-profit, municipal and commercial.

In addition, the current method of price regulation may result in inequities, since a number of cemeteries receive municipal or organizational subsidies which are unavailable to others. This forces some cemetery operators to rely on the revenue raised through the sale of cemetery supplies in order to stay viable and competitive.

These concerns raise the question of whether price regulation should be continued, or at least modified.

16) Unmarked Burial Sites

Unmarked burial sites are often discovered during the course of land excavations (e.g. archeological digs, farming, real estate development).

At present, the legislation is unclear regarding the procedures that are to be followed when such a site is discovered.

Legal opinions on this subject have been solicited by different parties over the years. The most recent of these indicates that the act deems such a site to be a "cemetery" within the present definition of the term. Therefore, these sites are technically subject to the restrictions of the act, which include prohibiting disinterment except for the purpose of reinterment (i.e. not for purposes of archeological research) and requiring perpetual maintenance, fencing etc., if the remains are left undisturbed.

Since, as it would appear, these provisions do not accommodate the complex issues arising with respect to unmarked graves, the various interest groups (including owners, native people, archaeologists and the Ministry of Culture and Communications) have, of necessity, been dealing with these discoveries in an ad hoc manner. This could render them liable for prosecution if the letter of the law was enforced.

The current process places a substantial burden on land owners who cannot proceed with development until the matter of disposition is resolved; also upon archaeologists, who are unable to undertake the procedures necessary for proper research.

Many groups have complained about the ambiguities in the legislation and have called for amendments which would distinguish an unmarked burial site from a cemetery and set out precisely the procedures to be followed when such a site is discovered.

In addition, there is the highly sensitive matter of the concerns of native groups, who would prefer to see native remains left undisturbed.

17) Safety of Cemetery Sites

An issue which has recently attracted considerable attention concerns the safety of cemetery sites, particularly with respect to monument installation. Recently, a four-year-old child was killed when an insecure monument toppled over on her; the incident became the subject of a coroner's inquest.

The legislation not does include any requirements pertaining to monument installation standards.

18) Differential Treatment of Cemeteries

At present, the Cemeteries Act regulates non-profit cemeteries (which include religious, plot-owner and municipal cemeteries) differently from profit-making cemeteries. The obligations of for-profit cemeteries are somewhat more involved than those for non-profit cemeteries, and include the filing of an audited statement on an annual basis.

In addition, individual non-profit cemeteries may be exempted from any provisions under the act. Past exemptions resulted

in modifications made for some religious cemeteries but not for other religious cemeteries, and special regulations for certain non-profit cemeteries but not for others.

Although it may not be necessary to develop a new act to regulate all cemeteries under identical rules, the question does arise as to what the sensible basis for differentiation should be in the future.

PROPOSED DIRECTION

A variety of options was considered with respect to each issue. These options were evaluated in light of impact on the various companies in this sector, the demonstrated effectiveness of similar measures in other markets and jurisdictions and, where applicable, the ability of the Ministry to implement and enforce them.

In general, the proposed direction recognizes the changes in consumer preferences that have affected the death care industry, the increasingly multicultural nature of Ontario society, and the enhanced role of the commercial provider in this sector.

It also recognizes that, although there must be some differences in the application of regulatory controls to different types of cemeteries, the consumer's interest is paramount.

Exemptions from any of the provision of the act should, therefore, be permitted only in cases where it can be clearly demonstrated that there will be no loss of consumer protection in doing so.

Although it is acknowledged that cemeteries may have some inherent advantages in the market for cemetery supplies, the principle of consumer choice would suggest that such supplies continue to be available from as many sources as possible.

A number of measures are proposed, however, which would enhance the competitive position of alternate providers of cemetery supplies.

The proposed direction also aims to reduce the Ministry's role with respect to functions which are already being carried out effectively at the municipal level. Further, it is proposed that certain administrative procedures currently carried out by the branch, which have proven to be of little benefit, be discontinued or at least modified.

Finally, the proposed direction calls for significant changes with respect to procedures for the collection, handling and auditing of the perpetual care and pre-need trust funds.

More specifically, the proposed direction is as follows:

1) Establishment of the Cemetery

It is proposed that the existing act be modified to reduce the role of the Ministry in the approval process. Nevertheless, although the primary responsibility for the approval of a cemetery should rest with the municipality (with the Ministry normally playing a passive role), the act should also provide the Ministry with certain residual powers to disallow the establishment or to override municipal objections.

2) Perpetual Care

It is proposed that the act should replace "perpetual care" with a definition of "care and maintenance funds" and require that money be set aside and held in trust by an authorized trustee for the future care and maintenance of the cemetery.

The regulations would define the amounts to be entrusted and prohibit withdrawal until all burial spaces are sold.

The act should provide the enabling power to permit term burial as an option for consumers. However, the regulations should remain silent on the issue until such time as full public discussion is undertaken.

3) Cemetery By-laws and Regulations

It is proposed that the act continue to require that all by-laws be submitted for approval by the Ministry, and that it further require certain standard elements to be included.

The regulations should be drafted to define these common elements to include standard notification procedures to reclaim an unused lot, a standard formula for repurchase of a lot by a cemetery, consistent and nondiscriminatory service fees, no discrimination on the basis of burial practices, and standard disinterment/reinterment procedures. The Ministry should retain the power to approve or revoke all by-laws.

4) War Graves

It is proposed that the act provide the enabling power to pass regulations pertaining to Veterans' graves and markers.

5) Rights of a Lot Owner

The act should provide a lot owner with specific rights, including the right to an identifiable grave, to erect a memorial, to have reasonable access to the lot, to permit public access for visitation, and to appeal any bylaw of the cemetery.

The act should clarify the rights and responsibilities of a cemetery owner. Since a cemetery owner has responsibility to ensure all burials are conducted in a decent and orderly

manner, to preserve and maintain the property and ensure public health safety, a cemetery owner must have the authority to pass regulations in order to fulfill those obligations. Thus, a cemetery owner may make regulations pertaining to conduct within the cemetery, and standards pertaining to the materials and installation of monuments and other cemetery supplies.

6) Abandoned Cemeteries

The act should continue to specify that the municipality must ultimately assume responsibility and that the Minister is deemed to have an interest in a closed or abandoned site.

The act should specify that a cemetery owner having more than one cemetery site, and continuing to operate at least one of those sites, must continue to assume responsibility for any other cemetery under his or her care which may be receiving no revenue.

The regulations should define and clarify the respective responsibilities of the Minister and the municipality. For instance:

- If a cemetery is abandoned or is closed, the Minister has the power to acquire all books, records and accounts;
- The Minister must notify the municipality of its obligations regarding the closed or abandoned cemetery;
- The municipality in which the abandoned or closed cemetery is situated is deemed to be the owner;
- The municipality will have the authority to sell or transfer ownership of a closed or abandoned cemetery to another owner;
- The municipality may establish a Board of Trustees to maintain the cemetery;
- The new owner may use the interest portion of the perpetual care fund and will assume all rights and obligations of ownership;
- A Board of Trustees may raise revenue for the cemetery in a manner similar to that of a charity.

7) Solicitations

It is proposed that the act provide enabling power for regulations to be made governing the method, manner and conditions under which cemetery goods and services may be offered for sale. The licensing and bonding (minimum $5,000) of cemetery and monument salesmen should be required. Cemeteries should

also be subject to bonding in view of possible infractions by their sales forces.

Door-to-door and telephone solicitations by cemeteries and monument retailers should be subject to restrictions relating to times and places at which they can be made. Comparative price and service information may be provided by a salaried salesperson using such passive techniques as direct mail and media advertising.

In addition, the act should prohibit solicitations of monument sales within 30 days of burial.

8) Consumer Information and Disclosure

It is proposed that legislation be introduced to enable regulations to be made:

- requiring that all contracts, both at need and pre-need, contain certain specified information, including a detailed schedule of goods and services and a statement of cancellation privileges and charges;
- requiring that a fully itemized price list of all available goods and services be maintained and distributed to all purchasers prior to negotiation of the contract;
- requiring that a copy of the cemetery by-laws (with a plan of the cemetery attached) be provided to all prospective purchasers;
- requiring the disclosure of price and service information over the telephone upon request.

In keeping with the policy developed with respect to pre-arranged funeral services, the mandatory filing and approval of pre-need contracts is not recommended.

9) Advertising

There is no compelling reason at present why advertising should be regulated. However, it would be desirable to provide enabling power in the act for regulations to be developed, should the need arise in the future.

10) Pre-Need Sales - Protection

It is proposed that provisions be introduced, similar of those of the Prepaid Funeral Services Act regarding the vesting and handling of trust funds.

The Act should provide that the full amount of the money received be held in trust and that the purchaser or his or her personal representative has the right to cancel a contract

anytime before delivery of the goods and services purchased. The provisions relating to the passing of accounts should be repealed; instead, the act should empower the Ministry to inspect trust accounts and the records pertaining to them.

Enabling authority should be provided for regulations governing the manner in which trust funds may be invested and withdrawn, and requiring the filing of audited annual financial reports.

11) Delivery of goods purchased pre-need

Authority should be provided in the act for regulations which would require that, in all cases where the contract calls for delivery of goods pre-need, the purchaser be provided with a disclosure statement. It should set out the various purchase and delivery options available and state, with respect to each option, whether the purchaser has the right of cancellation or resale. The statement should be signed by the purchaser before the contract is finalized.

12) Compensation fund

As long as the act continues to forbid the selling of cemetery and mausoleum spaces prior to the establishment of a cemetery or the construction of a mausoleum, the likelihood of major individual consumer losses is remote.

However, as the amounts held by cemeteries for pre-need services increase, so does the risk of significant misappropriations. Therefore, the act should provide the enabling power for the implementation of such a fund in the event that future developments justify it.

13) Health and Safety

The act should make it clear that the cemetery owner in all cases is liable for the safety of the cemetery site, including the security of monuments erected there. The settling of the liability question may result in greater diligence and encourage the maintenance of adequate safety standards.

Further recommendations regarding safety standards may be forthcoming after a review of the results of the coroner's inquest mentioned earlier.

14) Prices

It is proposed that the requirement of rate approval be abolished.

The act would require the annual filing of fees for all cemetery lots, supplies and services, and the Ministry would have the power to intervene to rollback prices if they are excessive, unconscionable or discriminatory. The criteria for intervention should be specified in the regulations.

15) Sale of Cemetery Supplies

No change in the legislation is warranted. The consumer would not be served by restricting access to memorials. Whatever unfair practices are perceived to be taking place, they should be dealt with through other measures. For instance, the recommendation with respect to cemetery by-laws includes prohibiting discriminatory practices. As well, the enforcement mechanisms provided under other legislation (the Business Practices Act and the Competition Act) can be used.

In addition to legislated changes, efforts should be made to encourage industry members to adopt voluntary guidelines.

16) Cremation

The act should consolidate all of the key provisions related to cremation under one section.

Additional regulations should provide for:

- the mandatory use of a combustible casket;
- prohibitions on the cremation of a body implanted with a pace-maker;
- a mandatory deposit to be paid to a crematorium operator to cover the cost of interring in common ground any cremated remains which have been unclaimed for at least six months.

It is recommended that the act remain unchanged with respect to the provision governing the location of crematoria.

As stated before, the need for additional cremation facilities will increase, due to the escalating death rate and the growth preference for cremation. The legislation should remain flexible in order that future demand can be accommodated, particularly in areas which are underserved by cemetery operations. The approval process and regulatory measures are adequate to ensure that consumer abuses are minimized and disposition is controlled.

17) Unmarked Burials

It is proposed that the act include a definition of an unmarked burial site, clearly distinguishing it from a "cemetery".

The act should provide enabling authority for regulations to be made setting out procedures. Such regulations should address;

- the obligation to notify specified interested parties;

- o the responsibility of parties involved;
- o alternate forms of resolution and the procedures pertaining to them.

The regulations would only be introduced following consultation with all of the key interest groups (e.g. native groups, archaeologists, developers, farmers) and would be developed in conjunction with the principal ministries.

The Ministry of Culture and Communications should take the lead role in coordinating this consultative exercise and in developing the details of the regulations.

18) Differential Treatment

It is proposed that the act apply consistently to all cemetery types in the province, unless they are excepted by virtue of having met certain specified criteria set out in regulation. It may be necessary to "grandfather" some or all of the existing exemptions (i.e. allow the present exemptions, but disallow future ones).

40. The Theatres Act

THE THEATRES ACT

BACKGROUND

In 1911, public demand led to the creation of what is now known as the Ontario Film Review Board. Its job was to monitor films intended for public viewing in the province. Responsibilities were expanded by the Theatres Act of 1930 to include the licensing and monitoring of theatres for public safety as well as the licensing of distributors, exhibitors and projectionists. Over the years, a series of revisions was made to the board's approach to the review, classification and censorship of films. Then, in 1984, the Theatre Section's responsibilities were expanded to include the classification and approval of home videos and the licensing of video retailers and distributors by amendments to the act.

Overall, the purpose of the Theatres Act is to:

- provide classification and approval of films and videos to ensure that the public has a guide as to content;
- ensure that films presented to the public are consistent with current community standards; that is, only classified films are exhibited. This is accomplished through the licensing and monitoring of theatres and distribution outlets and the licensing of projection equipment in public venues other than theaters;
- protect children from unsuitable film content by ensuring that classified films which are not suitable for certain age groups are restricted. This is accomplished by the licensing of venues; the establishment of age restrictions related to film classification; inspection of theatres for compliance; and the monitoring of public complaints;
- assure safety in theatres where classified films are shown to the public. Licensed venues are inspected for compliance with legislated fire and safety requirements;
- maintain standards for film projectionists to ensure that certain fire and safety prevention procedures are maintained and that film projection takes place at advertised times without interruption. Film projectionists are licensed under the act.

As reviewed above, the act attempts to serve a number of purposes which reflect the need to assure both some relative level of community standards and public safety. A consistent theme in attempting to achieve these purposes is the constant need to update the legislation. Portions of the act become obsolete, or over time, are shown to be too general to deal with significant technological changes in the motion picture entertainment industry.

The specific objectives of the review of the Theatres Act were:

- to gain a general understanding of all current activities regarding the regulation of theatres in Ontario. (theatres, under the act, being limited to venues which present filmed as opposed to live entertainment);
- to examine issues related to regulation of theatres in order to propose updated legislation and minimize duplications;
- to propose possible ways to implement these changes to the act.

The Legislative Review Project was informed at the start that issues regarding censorship, definitions of pornography, the role of the Ontario Film Review Board and nature of community standards would not be part of the overall review. These areas were already the subject of review by the division.

INFORMATION - GATHERING PROCESS

The review of the Theatres Act was based upon information drawn from:

- policy papers and other documents, cabinet submissions and operational data pertaining to the administration of the Theatres Section;
- interviews with a number of staff within the section and division;
- interviews with people from the Office of the Fire Marshall (Ministry of the Solicitor General);
- interviews with staff of from the Policy and Apprenticeships Divisions of the Ministry of Skills Development;
- interviews with a number of theatre owners/operators;
- interviews with a Motion Picture Projectionist Union local.

Consultation with these representatives explored the issues related to the act, its strengths and weaknesses, and possible ways to improve the legislation.

In addition, the regulation of theatres in other provinces across Canada was reviewed. In general, classification of film and video is a common area of regulation across Canada. There are, however, variations. Five of the provinces include theatres in the general regulation of other types of

amusements. Theatres are specifically licensed in five provinces, while film exchanges or distributorships are licensed in all provinces. Most provinces have recognized the importance of monitoring the distribution of videos, and are contemplating or implementing licensing and classification programs.

A recent trend in several provinces has been to deregulate projectionists. One reason is that new technology has reduced fire and safety risk, thereby eliminating the need for a film projection specialist. Fire and safety provisions in other provinces are the responsibility of the fire marshall's office and local fire departments, and regulations for theatres are the same as those for other public buildings in general. Most provinces' inspection provisions include powers to inspect for compliance with classification requirements.

SPECIFIC ISSUES

1) Licensing of Theatre, Distribution Outlets and Projection Equipment

Licensing of theatres, distribution outlets and projection equipment has enabled the government to maintain control over the presentation of films to the public. This has not been without its problems. In the early 1970's for example, one theatre in Ontario converted from 35 mm film to videotape, thus circumventing the Theatres Act licensing and classification provisions. The act was revised. Similarly, the development of videotape, VCR and video rental markets has led to revisions to the act to include the licensing of video distribution outlets, in addition to theatres, in order to control film presentation to the public. Current developments in the proliferation of automatic video tape dispensers is again requiring changes to the act to control film venues and distribution. As well, recent revisions to the act have tried to clarify definitions of distributors (retail and wholesale). These definitions remain limited. Continuing to administer the act by using these types of definitions will mean ongoing revisions to the legislation to accommodate the continued changes in the marketplace and technology.

The alternative is to eliminate the licensing of theatres and only regulate film distributors, as Manitoba and Alberta have done. It should be pointed out that one weakness to monitoring the classification of film through of those is that not all distributors who distribute film in Ontario have offices in this province.

The licensing of motion picture projection equipment was originally introduced to monitor "travelling picture" shows and the films being shown. More recently, it has been a method of controlling film projection in non-theatre locations, such as bars and lounges. However, such tight control no longer appears to be needed as exhibition of

unclassified film is a direct contravention of the act.

2) Age Restrictions

By licensing theaters and specifying age restrictions, the government is able to control the viewing of films by children. Age is restricted by the classification of the film (Restricted, Adult Accompaniment) and by the time of day an unaccompanied child may enter a theatre. Theatre owners attempt to comply in good faith.

However, retail film and video outlets as well as the more recent automatic video machines, present difficulties ensuring that the age restrictions under the act are enforced. Under currently proposed revisions to the act, the owners of retail film distribution outlets will be responsible for ensuring that children do not rent videos that are restricted to those 18 years of age or older. Films classified as Adult Accompaniment will not be subject to enforcement under these proposed revisions to the act.

Given the number of outlets and the limited number of inspectors, it will be difficult to ensure that retail video distribution outlets comply with age restrictions except through investigation of public complaints. Further difficulties are arising with the establishment of automatic video distribution machines. These machines, upon insertion of a credit card, will dispense any selected videos from their internal storage. Automatic video distribution machines are located in shopping centers and in convenience stores, often on a 24-hour basis. Attempts to establish responsibility for the machines would be difficult. Restricting automatic video distribution machines to only certain classifications of film (eg. family entertainment), would likely be opposed by the industry and possibly by the general public as well.

Another new form of technology, "the video jukebox", will soon be established in Ontario. By inserting money or a credit card, the viewer will be able to see classified films, including restricted ones, on the jukebox's screen. These jukeboxes may be located in bus terminals, railway stations and airports as well as other locations such as restaurants and taverns. Like the automatic videotape dispensers, video jukeboxes will make enforcement of age restrictions difficult.

As long as the government is concerned about protecting children from unsupervised viewing of inappropriate film, regulations should ensure that only classified films are shown and that age restrictions affecting children are maintained. In the case of public theaters, the theater owner could be viewed as a "surrogate parent", controlling children's access to inappropriate films.

The viewing of videotaped, classified film obtained through video retail outlets would take place in the home, where there would likely be parental or other adult supervision. The

argument could thus be made that video retail distributors should comply with the Restricted classification of film, while Adult Accompaniment regulations need not apply.

3) Fire and Safety Provisions

The Theatres Act has a number of provisions regarding public safety through the installation of fire prevention equipment and the establishment of fire safety practices within theatres.

Fire safety in movie theatres was a fundamental reason for the original enactment of the Theatres Act.

This concern for fire safety was due to:

- congregation of a large number of people in a public building;
- the high flammability of the cellulose nitrate film that was once used;
- the tendency of film projection equipment to malfunction, causing the film and projector to catch fire;
- the lack of a uniform provincial building code to regulate theatre construction;
- the lack of a comprehensive Ontario-wide fire code to regulate fire safety and fire prevention in public buildings.

In recent years, many of these conditions have changed. For instance:

- Movie film is now made of cellulose acetate and is now not seen as a fire hazard;
- Film projection equipment has improved significantly with a high level of automation. Malfunctions are rare and if they do occur, do not cause fires;
- In 1974, a uniform Ontario Building Code was established, and addressed the architectural layout of public buildings;
- In February 1987, a comprehensive Ontario Fire Code was established. It dealt with public buildings, and movie theaters in particular. It requires the installation of fire safety equipment and the maintenance of fire safety practices, and also contains provisions addressing the storage of the old cellulose nitrate movie film.

As a result of these changes, the fire and safety provisions of the Theatres Act have either been made obsolete or superceded by more comprehensive legislation. Currently, the

Theaters Section carries out inspections of theatres for compliance with the fire and safety provisions of the act. The number of inspections would suggest that each theatre in Ontario is visited one to two times in a one-year period. Inspections under the Ontario Fire Code are also carried out by municipal fire departments or by representatives of the Ontario Fire Marshall's office. This duplication of inspections by two government agencies would appear unnecessary.

It should also be noted that the Theatres Act is the only legislation in Canada that includes such fire and safety requirements. Other jurisdictions do not include inspection of fire and safety in their motion picture legislation. In most cases, it is the responsibility of a more appropriate provincial or municipal government body.

4) Projectionists

Under the current act, film projectionists must have a licence issued by the Theatres Section to present film in licensed theatres and/or operate licensed film projection equipment. Projectionists first register as apprentices. Currently, there are over 300 first-class projectionists, about 780 second-class and 70 apprentices. Theatres Act provisions for the licensing of projectionists would appear to have been motivated by the early fire and safety concerns regarding film and film projection equipment, as well as concern that the film be shown without interruption. Projectionist training has been somewhat adhoc, as there have been only limited regulations concerning curriculum and length of training under the act. In Ontario, most other skilled trades are licensed under the Apprenticeship and Tradesmen's Qualifications Act. These other licensed trade occupations have curriculums established by regulation under that act, with an in-school component taught at a community college. In discussions with the Theatres Section, theatre owners and a Motion Picture Projectionists local, it was evident that technological change has reduced the training requirements of projectionists.

Increased automation has simplified the film projection process. However, the introduction of multiple-screen theatres, where projectionists now manage film projection on up to six screens, has increased their responsibilities. Technical knowledge requirements have thus decreased, while coordination and management skills may have increased.

Projectionists are licensed under motion picture legislation in only two other jurisdictions - Nova Scotia and New Brunswick. Projectionists in Manitoba are licensed under the Department of Labour. Albert and Saskatchewan, when they revised their equivalent to the Theatres Act, delicensed film projectionists. The merits of ensuring that projectionists were trained did not outweigh the costs of administration and the restrictions that licensing placed on labour markets.

While theatre owners and projectionists in Ontario seem to be satisfied with the status quo, any revision to the Theatres Act should consider either removal of the licensing provision for projectionists or transfer of responsibility for licensing from the Theatres Act to the Apprenticeship and Tradesmen's Qualifications Act, under the Ministry of Skills Development.

GENERAL CONCLUSION

The Theatres Act appears to be successfully fulfilling its objectives, particularly those related to film classification and censorship. As long as the government sees it to be in the public interest to classify and censor films, the act and the provisions concerning classifications and censorship will need to be maintained. This may take the form of a revised act, or be combined with regulations of other entertainment legislation into an omnibus act as is the case in Alberta, Manitoba, Nova Scotia and New Brunswick. In terms of consumer protection legislation, it would appear that classification and censorship may be the only appropriate reasons for regulating the movie theatre industry. The provisions of the current act which address other matters, such as age classification, licensing of venues and distribution channels, fire and safety, and projectionists, could be modified or eliminated in light of new film industry technology and other legislative changes (eg. Ontario Fire Code), without placing consumers in a vulnerable or unprotected position.

PROPOSED DIRECTION

A variety of options was considered, ranging from minimal change to significantly less government involvement in the industry.

The direction proposed is for a revised act focusing on film classification, and recognizing the role of theatre owners and video retailers in the supervision of age restrictions.

In general, this proposed direction recognizes the historical and technological changes that have affected the Theatres Act. It also recognizes the ongoing concern that children be protected from unsupervised viewing of films that are considered inappropriate. It is necessary to ensure that only classified films are shown in Ontario and that age restrictions affecting children are maintained. Particular emphasis would be placed on public theatres where the theatre owner would be considered a "surrogate parent", controlling children's access to inappropriate films (eg. Adult Accompaniment and Restricted). It is further recognized that video viewing would take place in the home, where parental or other adult supervision would be likely. Video retail distributors would be required to comply with the Restricted classification of film, while Adult Accompaniment regulations would not apply.

Age restrictions limiting access to restricted films to persons 18 years and over would also apply to automatic video distribution channels and video jukeboxes, with notices indicating that it is unlawful for minors to have access to Restricted films from these sources. Enforcement would be on a public complaint basis for these distribution channels. It is recognized that age restrictions would be more difficult to enforce with automatic video dispensers and video jukeboxes.

Finally, it is proposed that provisions dealing with projectionists and fire and safety be removed.

More specifically, the proposed direction is as follows:

1) Regarding classification and censorship: retain the existing classification system.

2) Regarding venue/distribution channel/equipment licensing:

   - retain licensing of theatres, video retailers, and film distributors but exempt schools, art galleries, and film festivals, in keeping with recent proposed revisions;

   - eliminate equipment licensing as obsolete;

3) Regarding age restrictions:

   - retain age restrictions currently in place in licensed theatres (Restricted and Adult Accompaniment);

   - establish and enforce the "Restricted to 18 years or older" provisions in retail video outlets;

   - establish age restrictions for automatic video distribution machines or video jukeboxes by requiring notices stating that it is unlawful for a minor to rent a video from that source.

4) Regarding fire and safety provisions:

   - remove all fire and safety provisions from the Theatres Act, with the exception of stating the responsibility of theatre owners to comply with the Ontario Fire Code and Ontario Building Code;

   - all inspections related to fire and safety should become the responsibility of the Ontario Fire Marshal's office and municipal fire departments only.

5) Regarding projectionists:

   - provisions concerning the licensing of projectionists, and regulations concerning their training and qualifications should be removed from the Theatres Act;

- projectionists should be deregulated.

6) Regarding powers of enforcement for Theatres Section investigations:

   - powers of Theatres Section inspectors to enforce fire and safety regulations should be eliminated;

   - theatre owners' responsibility for showing only classified films should be retained;

   - projectionists should no longer be responsible for fire safety in theatres;

   - provisions for inspecting projection equipment should be removed;

   - appeal procedures should be made consistent with other regulatory acts, based on the Legislative Review Project's review of CRAT and its appeal processes;

   - <u>proactive</u> inspection could include routine inspection of theatres and video retailers to ensure compliance with classification and age restriction requirements, or <u>reactive</u> inspection which could rely on public complaints only, to be investigated by another division group. This would eliminate all routine inspection.

41. The Athletics Control Act

THE ATHLETICS CONTROL ACT

BACKGROUND

The Athletics Control Act was passed under a different name in 1920. The current act came into force in 1947 and has been subject to minor amendments since that time. Its purpose is to promote amateur sport and to supervise professional sport.

INFORMATION-GATHERING PROCESS

The process began with a literature search and review of relevant academic materials and texts. Newspaper articles from the Ministry's clippings files were also reviewed.

Similar legislation in the other provinces was given a comparative review to determine trends, as well as to identify unique approaches to particular issues. A sampling of similar American legislation was also reviewed.

In order to gain a regulatory perspective of the issues, the review team held a series of consultations with the athletics commissioner, members of the Entertainment Standards Branch, Legal Services Division, and Investigation and Enforcement Branch of the Ministry of Consumer and Commercial Relations.

Additional consultations outside the Ministry involved the Ministry of Tourism and Recreation, Doctors Michael Schwartz and Bruce Stewart, and the Ontario Medical Association.

GENERAL PROBLEM AREAS

The stated purpose of the Athletics Control Act, would not appear to fall easily within the general framework of the Ministry's consumer protection-oriented legislation. The mandate is, however, similar to legislation currently administered by the Entertainment Standards Branch.

The actual regulatory scope of the present act is quite wide, but in practice, regulatory activities are limited. Therefore, there is a need to mesh the statute with current and anticipated practices. In doing so, it is important to determine whether the administration of the legislation may be best accomplished outside of Ministry of Consumer and Commercial Relations.

SPECIFIC ISSUES

Five major issues were identified as a result of the review of the act. They are briefly described as follows:

1) Purpose of the Legislation

As stated before, the primary purposes of the legislation are the promotion of amateur sport and the supervision of professional sport. Over the history of the statute, the practical purpose of the legislation has, however, been limited to the physical and financial protection of people involved in combative sports, primarily professional boxing. In light of the contrast between statutory expression and implementation, it is clear that the legislative purpose requires re-examination.

2) Scope of the Legislation

An issue which is closely related to the purpose of the Act is the scope of sports which fall within its legislative mandate. The term "professional sport" is currently given a very expansive definition in the Act. Little or no powers are provided to the commissioner over this wider range of sports. Instead, the effective legislative scope is limited to the sports of boxing and wrestling. What should the effective scope of the act include?

3) Safety and Medical Issues

Both the Canadian and American Medical Associations formally support a prohibition of the sport of boxing. In the meantime, the current regulation, which requires that a medical practitioner be present at all boxing matches, is observed at each match. There is a lack of definitive data on the comparative health risks of boxing and other sports, such as football and hockey. Do the current regulations provide sufficient protection for participants? Can anything be done through the legislation to add to knowledge about potential health risks to boxers?

4) Administrative Issues

The enforcement provisions in the Act give the Minister and the Commissioner very broad and discretionary powers. Are these powers necessary for the administration of the legislation? The McRuer Report highlighted a number of aspects of the Act which were considered to be potentially in conflict with the principles of fundamental justice. Many of the provisions need to be re-assessed as part of an overall review of the Act.

5) Revenue Generation

Currently, the revenue from the taxation of gate receipts at boxing and wrestling events does not cover the expenses of the

Commissioner's office. The percentage tax has never been changed from two percent, although the legislation provides an available range of one to five percent. The legislation does not provide any criteria upon which to base a decision to change the percentage tax on gate receipts. Current and alternate forms of revenue generation need to be reviewed.

PROPOSED DIRECTIONS

1) Purpose of the Legislation

As the Ministry does not involve itself in the promotion of amateur sport, it is proposed that this statutory purpose be removed from the legislation. Further, the Commissioner is only responsible for the supervision of combative sports. Thus, it is further proposed that the responsibility of the commissioner to supervise "professional contests and exhibitions" be limited to combative sports.

2) Scope of the Legislation

In light of the above proposed direction, a number of matters arise concerning the expression of the legislative scope of the Act.

It is proposed that the scope of legislation be limited to combative-style sports, such as boxing. Preferably, the definition of the scope should be made as flexible as possible to allow for the regulation of new combative sports that may become popular. It should be noted that the Criminal Code includes an offence concerning involvement in a prize fight and that the exemption from this offence for provincially sanctioned events is expressed in language which is limited to "a boxing contest". Thus, for example, in order to bring kickboxing under effective regulatory control, it was necessary to redefine the sport as "boxing with the hands and feet".

It is further proposed that all references to "amateur" sport be removed from the Act, as such sports are more appropriately within the mandate of the Ministry of Tourism and Recreation. That Ministry would first, however, have to be given the regulatory power to supervise amateur combative sport for the purpose of assuring the physical safety of the participants.

Another related issue concerns professional wrestling. The professional wrestling rules set out in the act are effectively breached at each contest. Professional wrestling is not a sport but a form of entertainment and it is questionable whether it should continue to be included in the Act. It is proposed that wrestling continue to be included in the scope of the legislation, but that the "rules" be deleted from the regulations.

3) Safety and Medical Issues

The regulations include a provision that requires a boxer, in certain situations, to report to a neurological testing centre. The results of these tests are required to be sent to a legally qualified medical practitioner appointed by the commissioner. In cases where the tests take place outside the province, however, the regulations require that a boxer arrange to send the results to the Commissioner. In light of disclosure concerns, it is proposed that the regulations be amended to require a boxer to forward results of required neurological testing, when performed outside of Ontario, to a qualified medical practitioner appointed by the Commissioner.

It is further proposed that the regulations be amended to clarify the following powers of an attending medical practitioner:

- the ability to take blood and urine samples as part of the medical examination;
- the ability to perform a medical examination after the contest;
- the ability to stop the fight if, in the opinion of the medical practitioner, the boxer is likely to suffer a serious injury should the fight be allowed to continue.

Although, these powers would seem to be vested in a qualified medical practitioner, the regulatory language should be reviewed to ensure it is effective in giving doctors this authority.

4) Administration Issues

In line with the recommendations of the McRuer Report, it is proposed that the Act be amended to give the commissioner the power to make decisions concerning all compliance powers, instead of requiring a report to the Minister.

It is further proposed that the Act be amended so that when the Commissioner makes decisions of a commercial nature, including whether to issue a license, the decision can be appealed to the Commercial Registration Appeal Tribunal. It is important that the scope of matters that can be appealed to CRAT be limited to those matters within the expertise of that tribunal. For example, it must be made clear that a medical practitioner's decision that a boxer is not medically fit to box cannot be appealed to CRAT.

5) Revenue Generation

It is proposed that the legislation be amended to add a statement that the taxation of gate receipts from combative sports are intended to cover the expenses of the

Commissioner's office. It is further proposed that the Commissioner be required to annually review the revenue generated through the taxation of gate receipts to establish an appropriate rate of tax. Toward this end, it is suggested that an auditing process be established to complement the taxation requirements. Finally, it is proposed that the Commissioner be required to annually give notice of the applicable tax on the gate receipts to all interested people.

42. Relationship Between the Consumer Protection Code and the Industry-Specific Acts

RELATIONSHIP BETWEEN THE CONSUMER PROTECTION CODE AND THE INDUSTRY-SPECIFIC ACTS

BACKGROUND

The Supplementary Reports have provided an overview of the findings and proposed directions of the Legislative Review Project; at the same time, they have noted the methods, process, consultations and resources used to arrive at those conclusions.

This report to the Ministry of Consumer and Commercial Relations has been organized and presented in separate Supplementary Reports, each of the different areas being dealt with in a relatively independent manner. This was intentional, in order to demonstrate the different types of approaches that were taken to understand the unique areas under review.

More broadly, the Supplementary Reports addressed two general sets of proposed directions: foundation and industry-specific. Two qualitively different types of legislation would be required to ensure a broad, comprehensive and enduring consumer protection strategy. One type of legislation - termed foundation - would set generic expectations of the marketplace, as well as define a consistent involvement for the government. The second type of legislation would be industry-specific; it would be needed to capture any remaining industry-unique requirements that the foundation statute could not generically accommodate. It was tentatively agreed at the start that the final product should not be omnibus legislation; but rather "omnibus-like". This would ensure comprehensive and related legislation, while at the same time reflecting the unique elements and requirements of the industries regulated. As well, this structure would provide flexibility if improvements or modifications were needed in the future.

Although the work effort was distributed among teams and others in order to create a number of parallel and sequential activities, it was essential that, at a later stage, these individual efforts be combined and interrelated. This was needed in order to ensure two objectives:

1) comprehensive, consistent and minimally redundant proposed direction;

2) generic expectations in the foundation part, which could be applied to all consumer transactions and corresponding government action. These generic expectations would provide the division and Ministry with sufficient flexibility to deal with future, unanticipated events and issues without having to resort to additional legislative drafting.

In essence, an overall goal was to take as many of the specific expectations from the many industry-specific areas as possible, and "roll" them up into the foundation section, without compromising any unique needs and requirements for industry-specific areas. A good example is in the warranties area. Sufficient direction is proposed in the foundation chapters to set expectations regarding warranties for most products and services. However, it was recognized that certain purchases required additional legislative direction (for example, warranties on new homes and cars) that foundation direction could not capture without being overly general and making the direction ambiguous.

FIRST STEPS

To achieve the two objectives and overall goal, a "relating process" was developed; it is proposed in order to assist in the eventual organization of the new legislation. The option is also available to the Ministry to include:

1) other contemplated, draft or existing legislative direction not originally part of the project's scope (e.g., prepaid services); and/or,

2) areas that were part of the project's mandate but were "fast-tracked" because of their priority (e.g. new home purchases, death care).

The steps in the relating process are as follows:

1) Identify all of the possible "commonalities" between foundation and industry-specific proposed direction, focusing upon the entire consumer-business transaction (regardless of product or service) and the manner in which the division administers the legislation. A large number of possible common areas were identified by the project and can be grouped into the following general categories.

a) Coverage (common goods, services);
b) Prohibited practices;
c) Disclosure requirements;
d) Warranties;
e) Economic protection;
f) All regulation/intervention;
g) Business sanctions;
h) Dispute resolution;
i) Civil remedies;
j) Quasi-criminal sanctions;
k) Miscellaneous.

A more complete listing is provided in the Appendix.

2) Formalize the foundation expectations as the first priority. Attempting to relate foundation and industry-specific proposed direction at this time would not be

practical, given the number of changes that will occur between the release of these reports and the eventual draft legislation. It is both expected and welcomed that as a result of public consultations, deliberations of the Ministry, and the policy decision-making process, changes to the proposed directions will occur.

It is recommended that the Ministry attend first to the foundation proposed direction, and modify and carry these directions forward to a point where they are established and accepted.

3) Once foundation direction is established, the relating of foundation and industry-specific proposed directions can occur. This will be accomplished by using the identified commonalities as the "screen" or "sieve" to test primarily industry-specific proposed directions and determine whether these directions can be "rolled up" into foundation generic expectations. Pilot attempts of this nature have already been carried out by project staff to determine which of the common elements should be rolled up into the generic legislation.

4) Overall, there will be a number of analytical tasks and decisions to be finally made to determine, among other things:

- what industry-specific direction is already captured by foundation proposed direction;
- additional duplications in expectations across industry-specific areas that can be rolled up into foundation direction;
- whether any remaining unique aspects in industry- specific direction are sufficient to warrant stand-alone acts.

Outcomes

One obvious outcome expected as a result of these four steps will be a significant reduction in the size of the eventual, individual industry-specific acts. Also, the degree of roll-up and the careful use of regulations in the eventual foundation legislation could result in the repeal of at least one current industry-specific act. However, certain industries take pride in their respective legislation, which provides a degree of professional recognition. Possible reactions by industry groups would need to be considered as part of the broader decision-making process, balanced with the need to assure the two objectives mentioned above.